THE REDUCED UTILITY OF A LIFE PLAN

AS BASIS FOR THE ASSESSMENT OF DAMAGES FOR PERSONAL INJURY AND DEATH

by

ROBERT JULIUS KOCH

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Promoter: Prof M M Loubser

DECLARATION

I Robert Julius Koch hereby declare that the work contained in this dissertation is my own original work and has not previously in its entirety or in part been submitted at any university for a degree.

Signed at Vredelust this 1st day of November 1993.

FOREWORD

This project began over ten years ago when it was arranged by Juta's that Adv Gauntlett and I were to work together to update the 'Principles' in Corbett & Buchanan 'The Quantum of Damages in Bodily & Fatal Injury Cases'. Due to certain logistical difficulties the arrangement fell through. I had by that stage already done a good deal of reading and had assembled the material which formed the basis for the publication by Juta's in 1984 of 'Damages for Lost Income'. Mr Justice Corbett very supportively provided a glowing foreword. This thesis is an amplification of that earlier publication. Few words capture better the essence of damages for future loss than the following extract with which I prefaced 'Damages for Lost Income':

> *I am a part of all that I have met;*
> *Yet all experience is an arch wherethro'*
> *Gleams that untravelled world, whose margin fades*
> *For ever and for ever when I move.*
>
> from 'Ulysses' by Alfred Lord Tennyson

I come to this subject having qualified in 1974 both as an actuary through the Faculty in Scotland, and as an LLB with UNISA. Prior to this I had completed an honours degree in theoretical physics. A further formative period was three years spent lecturing statistics and computer management at the Business School of the University of Stellenbosch. I have for the last 15 years, the last 8 fulltime, earned a living doing damages calculations. The practice now handles in excess of 1500 claims per year.

I owe thanks to many people, but particularly to my children who have often expressed the wish that they had a normal father who stopped working at weekends. To those many others that I do not mention they are not forgotten. My special thanks goes to my business clients who have loyally supported me over the years and provided the raw material, ideas and opportunities which have so greatly helped to enlarge my perspective.

Cape Town
July 1993

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ABBREVIATIONS

AJ	Acta Juridica
AJCL	American Journal of Comparative Law
BML	Businessman's Law
C&B	Corbett & Buchanan 'The Quantum of Damages in Bodily and Fatal Injury Cases' Classified Reports (looseleaf Juta 1992)
CBR	Canadian Bar Review
FESPIC	Far East and Southern Pacific Spinal Injuries Congress
HSRC	Human Sciences Research Council
JIA	Journal of the Institute of Actuaries
JIAA	Journal of the Institute of Actuaries of Australia
JIASS	Journal of the Institute of Actuaries Students' Society
JPE	The Journal of Political Economy
LAWSA	The Law of South Africa (Butterworths 1979)
LQR	Law Quarterly Review
MLJ	The Manitoba Law Journal
MLR	The Modern Law Review
MMF	Multilateral Motor Vehicle Accidents Fund
PCAS	Proceedings of the Casualty Actuarial Society
SALDRU	South Africa Labour and Development Research Unit
SALJ	South African Law Journal
SALT	South African Life Tables
TASSA	Transactions of the Actuarial Society of South Africa
TFA	Transactions of the Faculty of Actuaries
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TIAA	Transactions of the Institute of Actuaries in Australia
TRENDS	Quarterly report of the Bureau for Economic Research at the University of Stellenbosch
TSAR	Tydskrif vir die Suid-Afrikaanse Reg

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STATUTES AND RULES OF COURT

SOUTH AFRICA

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OLD AUTHORITIES

CASES

CHAPTER 1

INTRODUCTION

***Summary**: This thesis is concerned with damages for continuing loss, such as most commonly arise with personal injury, or with the death of a breadwinner. The approach is multidisciplinary rather than multinational. The thesis comprises 4 sections: General theory; Technical issues; Technique and law governing personal injury claims; Technique and law governing claims for loss of support. The thesis does not seek to be a compilation of all relevant legal sources.*

[1.1] THE SCOPE OF THIS THESIS

This is a thesis about damages, the compensation that is awarded by a court for damage suffered in consequence of wrongful conduct. The emphasis is directed at damages for personal injury and death, events which give rise to a continuing loss over an extended period of time. Some would use the plural 'losses'. The distinction goes to the heart of one of the major ambiguities of damages assessment and forms a central topic of this thesis. Continuing loss arises with breach of contract, damage to physical property, and with pure economic loss. It follows that the issues addressed in this thesis are not confined solely to loss flowing from personal injury and death.

As a general rule damage for continuing loss is compensated by a single once-and-for-all lump sum.[1] For purposes of this thesis the lump-sum once-and-for-all rule is accepted as axiomatic and desirable. There will be some discussion of compensation by instalments.

It will be argued in this thesis that damage is a reduction in the overall utility of a person's life plan and that damages by way of monetary payment provide a substitute for what has been lost. The single once-and-for-all payment made by way of damages has the nature of a price, in a manner of speaking. The nature of this price is most obvious when using the technique of value of a chance,[2] the present utility of an uncertain past or future loss or gain. The damages awarded for uncertain past or future loss have much in common with a market value, another manifestation of utility, and it is instructive to examine the assessment of damages against the background of such a paradigm. Market value is important to the assessment of damages because it is, in theory, the price at which a victim may purchase substitute goods and thereby convert a loss of goods into a loss of money. The right to a series of future payments of money may be purchased for a single here-and-now lump sum.[3]

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[1]See 41.

[2]See 71.

[3]See 113.

[1.2] BACKGROUND TO RESEARCH

The assessment of damages is largely a question of fact with a sprinkling of legal rules governing the manner in which the facts are to be interpreted. These legal rules are supplemented by a large body of conventions drawn from various sciences, notably economics, sociology, statistics, and actuarial science. The major focus of this thesis is a critical overview of the conventional wisdom of the courts as regards these peripheral disciplines and an examination of the related logical and rational structures. Legal research traditionally has regard to foreign law. This has been done in this thesis, where appropriate, but, more importantly, the approach is multidisciplinary rather than multinational. In adopting this approach I have sought to move from the open arguments suggested by consideration of other disciplines towards structured reasoning suitable for legal analysis in the sense described by Honoré:[4]

> (There are two categories of presentation)': open arguments and appeals to rules of law. But in many ways the most important feature of Roman and modern legal argumentation has been omitted from the catalogue so far discussed: it is this feature that constitutes the essence of the Roman gift to modern Western civilization. I am referring to the existence of a canon of unacceptable arguments. If we compare Greek and Roman civilization and ask wherein the inferiority of the Greeks lies from the point of view of legal culture we may be inclined to answer on the following lines: The Greeks had laws and constitutions and conducted arguments before juries and the like, but their mode of argument was determined by rhetorical and not specifically legal considerations. To them any argument was grist to the mill: in particular arguments *in hominem*, that one's opponent was a scoundrel or that one had oneself performed notable services to the city; and arguments which appeal directly to philosophical or religious principles or to political considerations. The Greeks had in fact a notion of rhetoric, of the art of persuasion, and a theory or catalogue of types of arguments, in other words a notion of 'topic'. But what they lacked either in theory or in practice was the discipline to set up a canon of acceptable arguments proper to legal discourse. This involves a narrowing of the scope of the discussion with a view to strengthening within certain limits their persuasive power and so the stability of the conclusions reached. The appeal to rules of law is of course the first type of argument to be listed as acceptable....
>
> 'Secondly, there are conventions concerning the range of acceptable open arguments. The creation of these conventions depends on a certain professionalization of the law....
>
> 'Given, then, intellectual professionalism, it is possible for certain issues to be considered not in isolation from the moral, social, political and religious issues affecting society at large but in such a way that these are allowed to be taken into account only on certain terms and within certain limits. The terms are, I think, really twofold. The first is that open arguments resting on social values must ultimately give way to rules: in the last resort the argument that the decision proposed is inconsistent with a rule compelling the contrary decision must be accepted... The second is that the positive values which are the basis of open arguments are system-

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[4]Honoré *Legal reasoning in Rome and today* from *Select South African legal problems* edited by Kahn & Zeffert (Juta 1974) 84 91-3.

> neutral and person-neutral, that is to say that they are indifferent to the idiosyncratic features of religious, moral, philosophical or political thought systems and are not conceived *ad hominem*... The open arguments are the windows through which the law looks at society and by which the values of society filter through to the law. By them the law absorbs the values of the people: utility, equity, nature and the like. But they enter in that very general form in which they would be likely to be endorsed by the mass of people, rather than as specific programmes, and they are filtered through a professional mesh which reduces them to technically manageable principles and maxims... This impartiality between as between persons and systems is crucial to Western legal culture; it is the specific legacy of Roman law to our civilization and it is alien to Greek culture....
>
> 'The Romans therefore bequeathed to us a form of legal culture in which the closed and the open are combined. Law is a separate sphere of discourse: it is closed in the sense that all arguments adduced must be person- and system- neutral. On the other hand it is open in that open arguments, if they conform to the above criteria, are acceptable subject to the ultimate test of consistency with binding rules'.

There is a large divide between legal science and actuarial science. This gives rise to an intellectual no-man's land considered unduly actuarial by the lawyers and unduly legal by the actuaries. This thesis seeks to fill that gap. The actuarial issues discussed in this thesis are, with few exceptions, fairly trite by actuarial standards, but fairly advanced by legal standards. Suffice it to say that this thesis is not intended for actuaries but for lawyers who are concerned with the analysis of the relationship between damage and damages.

[1.3] STRUCTURE OF THE THESIS

[1.3.1] Part I - Theory of damages: Chapters 2 and 3 seek to define a theory of damage and damages. Chapter 2 deals primarily with general utility theory whereas chapter 3 goes on to deal with differencing and 'pigeonholing'.

[1.3.2] Part II - Financial and technical matters: Chapters 4 to 11 discuss and define a number of concepts and issues, largely technical in nature: Chapter 4 defines the all-pervasive technique of value of a chance; Chapter 5 examines this technique further using the risks of life and death as the paradigm; Chapter 6 deals with diverse funding techniques, including the fiction of consuming interest and capital as the means by which to reproduce the lost cash flow; Chapter 7 defines and discusses various forms of annuity; Chapter 8 examines the discount for delayed payment, that is to say the discount for the prospect of investment returns; Chapter 9 deals with the deduction for general contingencies; Chapter 10 deals with compensation for loss of use of goods, but, more importantly, the loss of use of money; Chapter 11 deals with the vexed issue of collateral benefits and examines these from an economic and administrative, rather then legal, point of view.

[1.3.3] Part III - Damages for personal injury: Chapter 12 examines in detail the techniques and legal aspects governing the assessment of damages for personal injury.

[1.3.4] Part IV - Damages for loss of support: Chapter 13 examines in detail the techniques and legal aspects governing the assessment of damages for loss of support arising from the death of a breadwinner. The chapter concludes with a discussion of the problem of the 'lost

years' which involves an overlap between the claim for loss of support and the claim for personal injury.

[1.4] REFERENCES

I do not attempt to provide a compilation of all available judgments and articles on the various topics. My focus is on ideas and methodologies. For this reason I will often cite a single judgment to illustrate an approach which has been used in a number of judgments. As a rule the most recent judgment on a topic includes a comprehensive survey of the relevant authorities up to that point in time. When this is not so I have provided guidance to a wider range of authorities.

[1.5] STYLE

In order to render the text more readable I have made extensive use of the first person 'I' rather than a more formal impersonal phraseology. For the same reason I use popular damages phraseology despite having pointed to the potential misconceptions that are contained therein. My approach to punctuation and capitals is a blend between Juta's house style and that preferred by the editors of *THRHR*.

CHAPTER 2

UTILITY

Summary: *This chapter examines utility theory and the related concept of value. In its most general form utility is merely descriptive of a vital life force. Its application to the assessment of damages requires objectivization. Money and risk are both subject to utilitarian considerations. Techniques can be developed for the measurement of personal utilities. The statistical concept of an expectation describes the utility of uncertain, usually future events. In suitable circumstances market value provides an objective guide to utility. Abstraction promotes forensic efficiency. Concretization, attention to personal details, ensures for each claimant and defendant a proper hearing. Justice involves a blend of these conflicting goals.*

[2.1] DEFINITION

[2.1.1] Human wants rational & irrational: Utility, or 'nuttigheid' as Van der Walt describes it,[1] reflects the capacity of goods or actions or even dreams to satisfy human wants.[2] The notion is as wide and varied as human want in all its diverse manifestations. This means that utility may be attributed to the most irrational and incomprehensible considerations such as witchcraft. Evaluations of utility will commonly be based upon incomplete information and misunderstood circumstances.[3] In its most general form utility provides no guidance as to generally accepted value, no rules for normative behaviour. It is purely descriptive of a vital force fundamental to human nature and the variable relationship of individuals with the environment of people, things and ideas.[4]

The objects of utility are not just tangible goods but also intangibles such as the services of other persons, ideas, hopes, dreams, and, of course, the buying power with which to obtain such of these things as may be acquired with money.

[2.1.2] Disutility: Utility has a positive and a negative aspect.[5] Bentham refers to the 'disutility' of work.[6] Pain is undesirable, it has disutility. A person will act to remove pain by, for instance, acquiring pain suppressing pills. For some persons work may have a high

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[1]Van der Walt 'Sommeskadeleer' 281 284. At 215 he uses the word 'utiliteit'. This is, it seems, merely a synonym for 'nuttigheid'.

[2]Page 'Utility Theory' 3-48 55-61 311.

[3]Page 'Utility Theory' 41-2 127.

[4]Page 'Utility Theory' 47.

[5]Page 'Utility Theory' 3 14-17.

[6]Page 'Utility Theory' 41.

utility early in the day.[7] This utility may decline with the passage of time until later in the day it has acquired a negative utility. Many persons aspire to wealth and freedom from the need to work. For them to work for a living has substantial disutility.[8]

[2.1.3] Summation of utilities: A person's total utility is not obtained by adding up individual utilities.[9] Thus a certain combination of goods may have a greater utility than the sum total of the combined individual utilities. Van der Walt refers to a matched team of horses.[10] One may also point to sets of stamps, china or chairs. In such circumstances the relative utility of the last item needed to complete the collection may be very high indeed. Alternatively an excessive quantity of bricks, wheat, or puppies has lesser utility to the possessor than the more modest quantity which he needs for his own use. If the surplus is unmarketable, for example puppies, it may acquire a negative utility, a disutility.

[2.1.4] Changing utilities: Utility is not constant in time. Things which have a high utility at one point in time may have a low utility at another point in time. Menger describes how the toys of boyhood are abandoned in favour of the books and sports of the student.[11] How these in turn are abandoned in favour of the tools of the trade with which we earn a living and how with old age the tools of our trade lose their utility. As the utility declines the point is reached where the price at which such goods can re-enter the market and be sold comes to have a higher utility than the goods themselves and we sell them to others. Menger here echoes the interaction between utility, the life plan of the individual, and value in exchange which, Van der Walt[12] has emphasised, is the basis for compensation.

[2.1.5] Hedonism: Bentham proposed a principle of hedonism:[13] Every person may be assumed to seek to maximize the utility of his life plan within the limitations of his available resources. Money is a major resource for achieving this purpose, but health, personality, education, family and associates, are other relevant factors. Economists have developed a theory of marginal utility based on maximizing overall utility within a limited income.[14] The weakness in this theory is its focus upon income and what can be purchased with it.[15] The theory has not so far succeeded in dealing with utility substitution without commercial value. Thus a man may optimize the utility of his life plan by ceasing to work or by working for less than his maximum capacity. The principle of hedonism proposed by

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[7]Page 'Utility Theory' 66.

[8]See paragraph 12.15.4.

[9]Page 'Utility Theory' 35 39 59. Realization as to the non-additivity of utilities led to the mathematical representation of total utility changing from a summation of separate individual utility functions to a single function dependent on individual commodities (see Page 77).

[10]Van der Walt 'Sommeskadeleer' 171

[11]Menger 'Principles of Economics' 232.

[12]Van der Walt 'Sommeskadeleer' 281 284 'planmatig'.

[13]Page 'Utility Theory' 39-44.

[14]Page 'Utility Theory' 66-7 71-91.

[15]Page 'Utility Theory' 127-8.

Bentham may remain valid but not for economists.[16]

[2.2] UTILITY OF A LIFE PLAN

[2.2.1] Ideal compensation: Utility is a very personal thing. The same goods or ideas or sensations or money will have different utility values for different persons. Damage may be defined as the disruption of the utility of a person's life plan. The ideal system of compensation would restore the overall utility of the plaintiff's life plan to what it would have been had there been no injury or death. There are two major factors which prevent a court from achieving this goal in practice:

[2.2.2] The limitations of money: A court is confined to awarding compensation in terms of money. Compensation is thus restricted to those aspects of personal utility which can be measured in monetary terms. The measurement of personal utility presents considerable problems which I shall deal with in the next section. Suffice it to note for the moment that Van der Walt restricts compensation for loss of personal utility to those aspects given recognition by our fellow men and to which can be ascribed a monetary value, albeit not a market value.[17] The monetary equivalent serves as a common denominator, 'algemene maatstaf'.

[2.2.3] Irreversible damage: The disruption of the utility of a life plan by way of catastrophic injury or death is usually, like the birth of a child, an irreversible process. No amount of money can ever remove the disruption and restore to the victim the life plan and its associated utility. The event of the injury or death gives birth to a completely different set of circumstances, a new life plan with its own different utility. The award of compensation, be it by lump sum or by instalments, is the stepping stone into a new life with a new set of opportunities and adversities. Van der Walt points out in this regard that compensation is but a monetary equivalent for what has been lost:[18]

> 'Deur middel van die toekenning van geld as skadevergoeding word dus 'n ekwivalent vir die verlore of verminderde nuttigheidswaarde van die eiser se vermoënsgoed vir die bevrediging van sy erkende behoeftes gegee'.

Van der Walt confines the notion of equivalence to past loss, 'afgeslote skade'. He then proposes a system of compensation which reduces compensation for future losses to a series of past losses[19]. **It follows that the notion of equivalence applies equally to past and future loss.**[20] Only in the most exceptional circumstances will money serve as the means

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[16]Page 'Utility Theory' 43 refers to 'Bentham's slow discovery that men do not all spontaneously desire "the greatest happiness of the greatest number"'; see too 93-5.

[17]Van der Walt 'Sommeskadeleer' 280-1.

[18]Van der Walt 'Sommeskadeleer' 280 285 286.

[19]Van der Walt 'Sommeskadeleer' 294 'afgeslote toekomstige gevolge'.

[20]McGregor 'Damages' 14ed 306 notes that there is no fundamental difference between past and future capitalized values; see too Kemp 'Damages' 3ed 63-4. See too paragraph 3.3.3.

to effect restitution.[21] Bloembergen[22] records the important concept of equivalent value in relation to a damaged *res*.

[2.3] UTILITY OF MONEY

[2.3.1] Price elasticity: There is no simple measure for utility. Some idea of the utilities of individuals may be obtained by raising the price of goods. The point at which persons stop buying gives a fair indication in monetary terms as to the upper limit to the utility of the goods. The consumer demand for many classes of goods is what the economists call 'elastic', that is the higher the price the fewer the purchasers. The same goods then have a wide variety of different utilities to different persons, but only one market price. As the market price rises an ever increasing number of potential purchasers cease to become buyers. If the price is raised to very high levels, as with diamonds and gold, the goods may acquire enhanced utility by reason of being expensive, an indicator of social status and a storage medium for wealth. Subsequent price increases may lead to increased purchasers.

[2.3.2] Money as the measure of utility: The price a person is prepared to pay for goods merely indicates that the utility of the money paid is less than or equal to the utility of the goods for that individual. Bentham saw in money a common standard of value by which utility could be measured.[23] He was frustrated in the further development of money as a common denominator by the realization that **the utility of money is not the same for all persons.**

[2.3.3] Social mobility: If I aspire to a modest style of living and have adequate funds to cover the cost thereof then the utility to me of further money may be fairly low. If I have difficulty maintaining my chosen style of living then the utility of further funds will be very high. One might say in general that money has greater utility to a poor man than to a rich man. This is however, an oversimplification. Friedman & Savage[24] have demonstrated that money has the highest utility when it enables a person to move up on the social scale, labourer to middle class, middle class to upper class. In practice there may be numerous grades. Some persons may have no desire to move up the social scale even if the money is available. Additional money in this context has low utility for them. The phenomenon of the rich person who watches every cent is not unknown. For such persons additional money has a high utility notwithstanding their wealth.[25]

[2.3.4] Rich man - poor man: *Prima facie* money has less utility to a rich man than to a

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[21]Van der Walt 'Sommeskadeleer' 285-6.

[22]Bloembergen '*Schadevergoeding*' 47-8 '*De benadeelde had in de toekomst nog van alles met de zaak kunnen doen - gebruiken, verkopen, enz. - maar al die toekomstige mogelijkheden vinden in de maatschappelijke werkelijkheid hun uitdrukking in de waarde... De benadeelde zich bijna altijd met hem aldus toegekende vergoeding in onze op ruilverkeer gebaseerde maatschappij zo niet een soortgelijke zaak, dan toch wel iets gelijkwaardigs kan verschaffen... Die gelijkwaardige zaak zal hem dan ook weer gelijkwaardige mogelijkheden verschaffen.*'

[23]Page 'Utility Theory' 37-8.

[24]Friedman & Savage 1948 *JPE* 279.

[25]Friedman & Savage 1948 *JPE* 279 282-3 note that the fact that a rich man will spend more money to avoid pain than a poor man does not necessarily imply that money has a lower utility to the rich man.

poor man because the rich man has so much more of it. This consideration suggests that awards for general damages for pain and suffering should be larger for rich men than for poor men. The appellate division in South Africa has ruled that the money value to be placed on the loss of an amenity of life is to be the same regardless of the financial circumstances of the plaintiff.[26] Corbett & Buchanan[27] note that the courts have not been astute to abide by this ruling.

[2.4] UTILITY OF RISK

[2.4.1] Risk aversives and risk seekers: A major concern of this text is the utility of risk. As with so many utilities the utility of risk varies widely. Economists have distinguished two important types of person in this regard, the 'risk seeker' and the 'risk aversive'.[28] In general the risk averse person will be as heavily insured as his finances permit. He will eliminate all possible sources of risk from his life plan. The risk seeker, on the other hand, will probably carry little insurance and apply all available funds to speculative entrepreneurial ventures which offer the prospect of large gains at long odds.[29]

[2.4.2] Insurance and lotteries: In general the cost of acquiring insurance exceeds the 'actuarial' value[30] of the risk. This is so because the premium includes the administrative costs of the insurer.[31] It follows that if people buy insurance it must be because their personal perceptions of the risks have a present utility which exceeds the utility of the premiums to be paid. Lotteries generally yield profit to the organizer. It follows that the value of the chance of a prize is less then the cost of a lottery ticket. Nonetheless lotteries are popular. The utility of the prospect of the gain of a large sum of money on small odds thus outweighs the utility of the more certain loss of the cost of a lottery ticket.[32]

[2.4.3] Market pricing: Perhaps the most important point to be gleaned from a consideration of personal utilities under conditions of risk is the distinction between the objective actuarial present value of the risk and the individual's subjective assessment thereof. The actuarial value of the risk would be obtained by using statistical averages, taken from observation, in conjunction with the value of the chance. For the purpose of the argument one needs to assume that there is sufficient reliable information available. The individual's subjective assessment is likely to be far more intuitive, probably based on emotion and less-than-full information. He will compare the present outgo, the insurance premium or price of a lottery ticket, with the imagined consequences and likelihood of the gain or loss. The only way one can determine the level of utility is to raise the price progressively until it reaches the point

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[26]*Radebe v Hough* 1949 1 SA 380 (A).

[27]Corbett & Buchanan 3ed 8n64.

[28]Levin 'Statistics for Management' 2ed 712-13; Kwon 'Statistical Decision Theory' 245-9.

[29]Friedman & Savage 1948 *JPE* 279 280 'Young men of an adventurous disposition are more attracted by the prospects of a great success than they are deterred by the fear of failure'.

[30]Friedman & Savage 1948 *JPE* 279 use the adjective 'actuarial' (see 284 287) to denote 'the statistical average' (see 285-6) which an individual can expect to receive.

[31]Friedman & Savage 1948 *JPE* 279 285.

[32]Friedman & Savage 1948 *JPE* 279 284n13.

where the individual being tested loses interest in taking out insurance or buying a lottery ticket. There will also be some risk-averse persons for whom the usual cost of insurance or lotteries is already too high. To measure their personal utility values one would need to **decrease** the price progressively until these people became buyers. The testing process will produce a variety of personal values, both larger and smaller than the objective actuarial value.

[2.4.4] Attraction of large sums: Friedman & Savage have concluded that the prospect of substantial gain at long odds has great attraction for lower income and some middle income groups.[33] The wealthy, it seems, are not generally attracted by the prospect of large gains at long odds.[34] After all *ex hypothesi* the wealthy already have substantial sums and their interest in life is more that of conservation of their capital by sound investment and insurance against risks.

Life offices offer immediate life annuities whereby a single lump sum premium acquires the right to a series of future payments contingent on the survival of the life assured. On death the capital is forfeited to the life office. Such plans, once fairly popular, are little sought after today. Conversely, endowment insurance policies which pay out a capital sum after a specified number of years, or on earlier death, are extremely popular and are taken out in large numbers. This observation suggests that the prospect of a series of future payments contingent on human life has less utility for the average person than an actuarially equivalent large lump sum.[35]

[2.4.5] General contingencies: The deductions made by judges for general contingencies is almost without exception larger than is suggested by unemployment statistics.[36] One also finds an exaggeration of the risk of death for a child.[37] This is the behaviour one would expect from a judge who is risk averse, that is say a person whose personal present utility for the prospect of future risk attaching to the series of uncertain payments exceeds the actuarial value. One finds similar risk-aversive behaviour in the judicial choice of discount rates of interest below the level indicated by prevailing market conditions.[38] This scaling

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[33]Friedman & Savage 1948 *JPE* 279 287 301

[34]Friedman & Savage 1948 *JPE* 279 301

[35]This conclusion is supported from other sources: see quotation in paragraph 3.1.2; see too Luntz 'Damages' 2ed 26.

[36]Cooper-Stephenson & Saunders 'Damages in Canada' 255-9; Street 'Damages' 120-5; Luntz 'Damages' 2ed 295-306; Boberg 1964 *SALJ* 194 212. In general unemployment statistics should be received with caution: they do not reflect all persons seeking employment (Hofmeyer 'Labour Market Participation' 1985 *HSRC* RDS1). Unemployment is not the only risk leading to reduced earnings, there may be years of increases below the rate of inflation, and tax rates may rise inordinately as they have done in recent years in South Africa.

[37]'... the possibility of the minor's death before age 16. The actuary from an insurance point of view treats that possibility as negligible. It is a factor that from a practical point of view must be taken into consideration' ***Paterson v SAR&H*** 1931 CPD 289 300-301.

[38]***Sigournay v Gillbanks*** 1960 2 SA 552 (A) 587F-G (4% per year adopted in face of market rates of 5,75% per year); ***Kotwane v UNSBIC*** 1982 4 SA 458 (O) 466inf (5% per year adopted in face of market rates of some 12% per year); ***Oberholzer v NEG Insurance*** 1988 4 C&B A3-1 (C) (1% per year net capitalization rate in face of a usual level of 2% to 3% per year).

down of the discount rate because of investment uncertainty is contrary to the normal behaviour of investors in a market who generally expect an increase to the rate of investment return as compensation for the prospect of risk. That is to say that such investors expect to pay a lower price because of the risks involved.[39] The seemingly anomalous judicial behaviour is to be explained by a perception that the claimant is able to use the award by consuming interest and capital to reproduce the lost income.[40]

[2.5] THE MEASUREMENT OF UTILITY

[2.5.1] Qualitative measures: A *qualitative* or *nominal* guide[41] to a person's utility in respect of something can be gleaned from statements such as 'highly valued', 'of little use', 'good'.

[2.5.2] Quantitative measures: An *ordinal* guide to personal utility[42] is obtained by ranking a variety of choices with numbers such as choice 1, choice 2, etc. The higher the number the lower the utility. One finds such measurements forming part of consumer surveys for marketing purposes. For our purposes an important type of ordinal measure concerns the utility of risk. We may ask the subject of our inquiry to rate his perception of the risk attaching to a future event on a scale of 0% to 100%. Zero rating means that the event is considered to be impossible, that is to say total indifference, a non-event. A rating of 100% implies absolute certainty that the event will occur, that is to say considerable concern with the outcome. A percentage between 0% and 100% implies a degree of confidence in the outcome of the event which lies somewhere between certainty and impossibility. Ramsey[43] described these ordinal values as 'degrees of belief' and demonstrated that they obey the same mathematical rules as the theory of chances, the theory of 'probability' as it is known to the modern statistician. It is a valid mode of thought to consider such degrees of belief to be chances.[44] Valuable information has been obtained in many fields by observing the degrees of belief attached by experts to uncertain events with which they are familiar.[45] These beliefs are often remarkably similar. This deserves note in a world where subjective evaluations usually differ widely between individuals.[46]

[2.5.3] Damages assessment: When a medical expert tells a court that the chance of a future

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[39]The higher the discount rate of return the lower the present value.

[40]See 84, 97.

[41]Kwon 'Statistical Decision Theory' 245.

[42]Kwon 'Statistical Decision Theory' 245.

[43]Ramsey 'Foundations of Mathematics' 166-84; see too De Finetti 1937 *Al Henri Poincaré* II 6-16; Savage 'Bayesian Econometrics' 112-15.

[44]De Finetti 1937 *Al Henri Poincaré* 1 16 '*La notion de probabilité, telle que nous l'avons décrite, est sans doute la plus voisine de celle de "l'homme de la rue"; mieux encore, c'est exactement celle qu'il applique tous le jours dans ses jugements pratiques*'.

[45]Kwon 'Statistical Decision Theory' 250-4; Grayson 'Drilling Decisions'; Savage 'Bayesian Econometrics' 155-6 lists numerous publications relating, among other things, to weather forecasts.

[46]De Finetti 1937 *Al Henri Poincaré* II 16 '*Cette conception, qui laisse tout à fait libre chaque individu d'evaluer les probabilités comme il le croit*'.

operation, *damnum emergens*, is 33% he is giving expression to his degree of belief based on his own experience and, possibly, available statistics. As regards *lucrum cessans* one commonly finds a plaintiff alleging that he would have been promoted had he not been injured. It can be most revealing to ask the employer to state his personal degree of belief that promotion would have occurred. 'Was it a 50% chance?' 'No, less than that' might be the reply. 'Was it a 25% chance?' 'No, more than that.' 'How much more?' 'About 33% I think' might be the conclusive reply. Inquiries of this nature can eliminate endless haggling. The plaintiff is awarded 33% of the value of the promotion as a certainty.[47] A critic might complain that these are but opinions with no scientific basis. The reply is that no better basis is available to the court. These opinions as to likelihood are the best available evidence from the lips of experts who can be expected to know better than anyone else. Such opinions often relate to a hypothetical state of affairs which can never be tested by actual experience, by waiting, and must often be based on relatively limited overall information. In certain situations it is possible to objectivize the subjective opinions by reference to logic of the situation or statistical data.[48]

The plaintiff in the matter may on similar inquiry reveal his personal assessment of his chances of promotion to be 95%. By reason of the injury he has been deprived of the utility of a 95% expectation of promotion. If compensation is based upon the personal utility of the plaintiff a chance of 95% should be used to assess the loss, the chance of 33% expressed by the employer should be irrelevant. As a general rule a court will accept the assessment of the employer and reject the assessment of the employee.[49] It is in this sense that awards for damages are objectivized.

[2.5.4] Act of measurement affects result: The measurement of personal utilities is beset with many problems, not the least being that the very circumstances of the inquiry may affect the answer that will be given. This is particularly so of a plaintiff who has a financial interest in the answers given. An employer may paint a rosy picture of the lost opportunities of his injured employee in the knowledge that he will not be called upon to 'put his money where his mouth is'. This is not to suggest that such persons are dishonest, they probably have sincere belief in the correctness of what they say. Savage[50] mentions in addition to bias:

> 'all subjects report, or otherwise reveal, that they do not know their own preferences; they experience wavering and indecision that cannot be identified with mere indifference'.[51]

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[47]See 71.

[48]De Finetti 1937 *Al Henri Poincaré* II 16 '*Deux sont les procédés d'où l'on a cru pouvoir déduire une signification objective de la probabilité: d'une part le schéma des cas également probables, et d'autre part la considération des fréquences*'. See 15 below.

[49]*Legal Insurance v Botes* 1963 1 SA 608 (A) 617F the widows personal views of her remarriage prospects were accorded little weight: 'Her attitude is that she will not remarry unless it is necessary to do so to support her child. I think little weight should be attached to her attitude'.

[50]Savage 'Bayesian Econometrics' 115-16. See too Ramsey 'Foundations of Mathematics' 172.

[51]Savage 'Bayesian Econometrics' 115.

Another problem:

> 'is that once an experimenter satisfies one preference of a subject he may quite drastically change the subject's pattern of preferences'.[52]

This consideration is of particular significance if one seeks to elicit information from a widow or injured plaintiff concerning preferences had the injury or death not occurred. Savage notes as well that:

> 'actual subjects are of course sometimes blind to their own clear advantage, failing to understand that they can only deprive themselves... Such facts do underline the need for education and training prior to, and even during, the application of elicitation devices'.[53]

This last consideration confirms the well-established principle of justice that a plaintiff should have legal representation if he is to present his case properly.

[2.5.5] Value amongst fellow men: The difficulties attaching to the measurement of personal utilities are probably the single most important reason why the courts seek out independent evidence concerning the utility of what has been lost. Account will thus be taken of loss of utility only to the extent that this can be corroborated by the opinions of others, that is to say objectivized.[54] Van der Walt[55] states in this regard that:

> 'Die skadevergoedingsregtelike vermoënsbegrip altyd moet gaan om die bevrediging van *erkende* behoeftes... Die nuttigheid van die betrokke goed vir die bevrediging van die vermoënsubjek se behoeftes, en daardie behoeftes as sodanig, 'n verkeerswaarde moet hê.'

Van der Walt has in mind here not market value but rather consensus as to value amongst our fellow men.

[2.6] SUBJECTIVE ASSESSMENTS OF CHANCE

[2.6.1] Intuitive notions of chance: The first formal record of a subjective interpretation of chance was by Ramsey.[56] Ramsey died shortly after preparing his paper. His line of thinking was then developed by a number of econometricians, notably Savage[57] and De Finetti.[58] The theory of subjective chances has its major application in the realm of utility

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[52]Savage 'Bayesian Econometrics' 115.

[53]Savage 'Bayesian Econometrics' 115.

[54]See too 22.

[55]Van der Walt 'Sommeskadeleer' page 280.

[56]Ramsey 'Foundations of Mathematics' 1931 158-98.

[57]Savage 'Foundations of Statistics'; Savage 'Bayesian Econometrics' 111-56.

[58]De Finetti 1937 *A I (Annales de L'Institut) Henri Poincaré* 1.

analysis,[59] a topic which has already been discussed. Statisticians are heatedly divided between Bayesians and classicists.[60] Jurists are essentially Bayesian in their approach to facts: Pre-established notions, such as 'not guilty', are modified in the light of the evidence. The recorded difficulties with communication between statisticians and the courts[61] most likely reflect, apart from disagreement on the meaning of the word 'probability', a classical-statistics bias on the part of many statisticians, particularly actuaries. From the court's point of view classical statistics is non-intuitive and therefore of questionable relevance to matters of the soul, such as justice and fairness.[62]

[2.6.2] Diverse manifestations: The more intuitive perceptions of chance, or 'probability' as the statisticians call it, may be viewed in a variety of different ways and for this reason the concept has a chameleon-like quality. Ramsey writes of degree of belief.[63] Savage in his last paper says that a subjective chance is 'a price, in a manner of speaking'.[64] Drèze writes that it 'may be interpreted as an insurance premium. Given such a price system...'.[65]

The deduction for general contingencies[66] and the value of a possibility[67] are both commonly determined by a process of subjective impression rather than arithmetic calculation. This similarity with the subjective chances described by Ramsey provides a fundamental link to utility theory. Formal statistics and monetary amounts are then merely ways for objectivizing the subjective impression.

Ramsey's concept of degree of belief is not seen in terms of price because we can hold degrees of belief in relation to events without for one moment considering their monetary value. The identification of degree of belief with 'price' arises when we come to deal with value in exchange, the price at which an individual will now exchange the prospect of an uncertain future gain or loss.[68] Under conditions of a frequent exchange of money for

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[59]Zellner has produced a collection of the important papers on utility under the title 'Basic Issues in Econometrics'. Kurihara 'Post Keynesian Economics' 388-436 includes a paper analysing the propensity of households to save rather than spend. The mathematical model used, hardly surprisingly, closely resembles the actuarial year-by-year method.

[60]Savage 'Bayesian Econometrics' 39-67.

[61]Downton 1982 *JRSSA* 395.

[62]Van Rensburg *Huldigingsbundel Daniël Pont* 384 405.

[63]Ramsey 'Foundations of Mathematics' 163-84.

[64]Savage 'Bayesian Econometrics' 112inf.

[65]Savage 'Bayesian Econometrics' 22inf.

[66]*Shield Insurance v Booysen* 1979 3 SA 953 (A) 965G 'The determination... for such contingencies involves, by its very nature, a process of subjective impression or estimation rather than objective calculation'; *Sigournay v Gillbanks* 1960 2 SA 552 (A) 569A.

[67]'In the present case I do not propose to express the possibility... in terms of a precise percentage. I intend merely to award an amount in respect of the total cost... which will take account of the extent of the possibility and the various imponderables...' *Blyth v Van den Heever* 1980 1 SA 191 (A) 226C.

[68]Cost-benefit analysis of social projects and legislation has been closely analyzed using calculations very similar to those used for damages assessments (see, for instance, Pearce 'Cost-Benefit Analysis' 2ed; Mishan 'Cost-Benefit

goods the subjective values held by different individuals become objectivized as market values. Bloembergen makes the important observation that the value, the price in exchange, of a tangible *res* such as a motor car, encapsulates in one figure all possible uses and disadvantages attaching to that *res*.[69] It is of course possible to find examples of a barter economy with a highly developed pricing structure but with no money and no statisticians.[70]

[2.7] EXPECTED VALUES

Before proceeding to a discussion of the relationship between utility and value in exchange we need first to explore further the manner in which personal evaluations of uncertainty are expressed in the minds of individuals, and accordingly in common parlance:

TABLE 1 - CALCULATION OF EXPECTED OVERTIME HOURS

A Range hrs	B Midpoint hrs	C Chance	D Value BxC
0	0	0,1	0,0
0-4	2	0,4	0,8
4-8	6	0,3	1,8
8+12	9	0,2	1,8
Total (the weighted average)			**4,4 hours**

[2.7.1] Averages: A *cardinal* measure of utility[71] is the 'expected value', or 'point estimate'.[72] This is expressed in a form that is familiar to most people as an average. For instance one might ask the employer in our example how many hours overtime the employee would have worked. The reply might be '4 to 5 hours per week at time plus one third'. Closer inquiry might reveal that in the past little overtime was worked but now it is usual for employees to work overtime. The figure of '4 to 5 hours' reflects a degree of belief on

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Analysis').

[69]Bloembergen '*Schadevergoeding*' 47-8 '*De benadeelde had in de toekomst nog van alles met de zaak kunnen doen - gebruiken, verkopen, enz. - maar al die toekomstige mogelijkheden vinden in de maatschappelijke werkelijkheid hun uitdrukking in de waarde... De benadeelde zich bijna altijd met hem aldus toegekende vergoeding in onze op ruilverkeer gebaseerde maatschappij zo niet een soortgelijke zaak, dan toch wel iets gelijkwaardigs kan verschaffen... Die gelijkwaardige zaak zal hem dan ook weer gelijkwaardige mogelijkheden verschaffen*'.

[70]eg the use of cattle amongst the Nguni tribes of southern Africa; see too Malinowski 'Argonauts of the Western Pacific' and the use of shell necklaces.

[71]Kwon 'Statistical Decision Theory' 245.

[72]Levin 'Statistics for Management' 2ed (expected value) 188-9 192-4 711-12 (point estimate) 287-92; De Finetti 1937 *Al Henri Poincaré* 1 19 (*l'espérance mathématique de la fréquence*); Savage 'Bayesian Econometrics' 126-9.

the part of the employer, perhaps based on some rough mental arithmetic. It would be useless to try to statistically analyze overtime worked in previous years, there was previously no overtime and conditions have changed. Further questioning might reveal a perceived chance of 10% that no overtime would be worked, balanced by a chance of 20% that overtime of 9 hours per week would be worked, with chances of 40% for overtime between 0 and 4 hours per week, and 30% for between 4 and 8 hours per week. The weighted average of these different views is 4,4 hours per week:

When dealing with subjective chances it is preferable to describe such a weighted average as an 'expected value'. This sort of average needs to be distinguished from an average over time which, although very similar, is not quite the same thing. The middle value for each range of hours worked has been multiplied by the associated chance and the resulting values summed to give the expected value. One may recognise here the technique of valuation of a chance[73] applied to each separate element. The figure of 4,4 hours multiplied by the rate of pay and discounted for mortality and interest gives the present value of the chance of earning overtime in one particular week.

Care should be taken that a single point estimate in the form of an average or an expected value does not obscure the extent to which the point estimate balances the relevant risks and alternative values:[74]

> 'What is necessitated is an exercise involving the various future possibilities being expressed as percentage chances, or averages, and subject to contingency allowances... The court makes the best assessment it can on all the evidence. That assessment is not a calculation. It may involve calculation but when calculation has been done the assessment exercise necessitates taking into account and employing devices such as averages, contingency allowances and percentage chances in order that the eventual award does justice by being fair to both sides'.[75]

The assessment of general damages for pain and suffering and loss of the amenities of life involves an averaging process.[76]

[2.7.2] Overlapping scenarios: The overtime calculation is an example of the general principle that the value of the chance of a composite event, the so-called, 'expected value', may be computed by adding the values of the chances for the separate components. This rule of additivity only applies to chances which do not overlap with one another, the chance of earning no overtime does not overlap with the chance of earning between 0 and 4 hours of overtime. The value of a chance is a measure of utility and utilities may be expected to obey similar rules of addition provided they do not interact. Where, however, they do interact then the utility of the group of goods is not equal to the sum of the utilities of the components. Thus the utility of a team of four horses trained to operate together is greater

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[73]See 71.

[74]See 97.

[75]*Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 61 64.

[76]Neethling Potgieter & Visser 'Deliktereg' 2ed 245.

then the sum of the utilities of each horse individually.[77] That the total utility should exceed the sum of the separate utilities is very much the exception. In the majority of cases the overlap of utilities has the effect that the utility of the total is less than the sum of the utilities of the components.[78] Thus a trader will often give a discount for bulk purchases. It is for this reason that the courts warn against overlapping heads of damage giving rise to double compensation.[79]

[2.7.3] Mental processes: The 'expected value' based on the weighted average of a variety of scenarios is a common measure of utility. In practice the person whose utility is being measured will not go through a conscious process of adding up the separate values for different scenarios as we did in table 1 above. The assessment of utility will be done more intuitively with perhaps brief reference to higher and lower values. Thus an employer might express the opinion that a fair average level of earnings is R18000 per year with a possible low of R12000 per year and a possible high of R21000 per year. An expert on family planning might express the opinion that a young widow would have had 3 children had her husband not been killed. In forming this opinion the expert might consider that families from that socio-economic group generally have between 2 and 5 children but that 3 is the most common. The widow might say that she and her husband planned to have two children.[80] Quite which expectation the court will accept will depend on circumstances.

[2.7.4] Expectation of life: The expectation of life is obtained by adding up the chances of survival to each individual future year.[81] It thus constitutes a **point estimate** of the age at which death is likely to occur.

[2.7.5] Personalized averages: Uncertainty in the form of pure risk and inadequate information, that is to say less than ideal evidence, is an integral and unavoidable component of many forms of damage. Van der Walt notes[82] in regard to loss of income arising from an injury:

> 'Alhoewel hiervoor 'n konkrete skadebegrip moet geld is dit bykans onmoontlik om

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[77]Van der Walt 'Sommeskadeleer' 171n91. The same may said of a set of stamps or chairs. Once the set has been completed, however, the acquisition of a further horse or stamp or chair has extremely low utility.

[78]This follows from the observation that subjective chances obey the doctrine of chances which states that the chance of the occurrence of two overlapping sets of events A and B either individually or together is C(A)+C(B)-C(A)xC(B) where C(A) and C(B) represent the chances of the respective events (see Levin 'Statistics for Management' 2ed 139-40). It follows that for overlapping sets of events C(AorB) is less than C(A)+C(B). This highly simplified reasoning is only valid in a very general sense. Friedman & Savage 1948 *JPE* 279 295 have pointed to the multiple S-shape of the utility curve of money and risk.

[79]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 113F. See too Luntz 'Damages' 2ed 243; Cooper-Stephenson & Saunders 'Damages in Canada' 275-91; *Lim Poh Choo v C&IHA* [1979] 2 All ER 910 (HL) 921g-h; *Light v Conroy* 1948 1 C&B 444 (T) 445; *Niblock-Stuart v Protea Assurance* 1973 2 C&B 323 (C); *Kriel v Administrator-General for SWA* 1986 3 C&B 539 (SWA) 548; 1988 3 SA 275 (A).

[80]The statistical average in this case might be 2,75 children. The 0,75 of a child reflects the value of the chance of a third child.

[81]See paragraph 5.1.4.

[82]Van der Walt 'Sommeskadeleer' 200n11.

> vas te stel of die eiser hoegenaamd sy persoonlike potensiaal om inkomste te verdien sou gebruik het - of hoe suksesvol hy daarin sou gewees het - as hy nie onregmatig beseer is nie. Daarom moet generaliserend (dws met gemiddelde syfers) gewerk word.[83] Hierdie "ruwere" konkrete skadebepaling kan mi ewe goed die toepassing van 'n minder subjektiewe konkrete skadebegrip genoem word.'

One might paraphrase these words by saying that every inquiry as to damages begins with all the known past and present circumstances of the claimant. Where information is lacking, particularly as regards the future, the gaps are filled by means of averages and expectations which are moulded as closely as possible to the known personal circumstances of the plaintiff.[84] An expectation in this sense is appropriately described as a 'personalized average'.

[2.7.6] The relevance of averages: The cynic would point out that if one has one's head in the fridge and one's feet in the fire then one is on average comfortable. This type of information nihilism destroys the tenuous validity that averages provide for facilitating agreement between men in the face of uncertainty.[85] Without using averages we cannot deal efficiently with uncertainty. Some information, albeit incomplete, is better than none at all. The cynic destroys but does not propose a better substitute.

[2.7.7] Average earnings: One finds numerous references to 'average earnings' in the decided cases.[86] The word 'average' as used by the courts generally designates 'an average over the years'. An average over different possibilities at one point in time is indicated by the words 'probable', 'likely' and 'expectation'. Average earnings statistics for a population[87] give guidance in one figure both as to probable expectations and an average in time,[88] that is to say the sample on which the statistic is based includes persons in

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[83]See too Bloembergen '*Schadevergoeding*' 106.

[84]Standard mortality tables will always be adjusted up or down in the light of the particular circumstances of the plaintiff: *Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 721-2 'the person concerned will live longer than the average'; *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1027 'an allowance of 50 per cent extra mortality'. Remarriage statistics are received with caution: *Legal Insurance v Botes* 1963 1 SA 608 (A) 617 'The census statistics... should not be regarded as a starting point, but merely as one of the facts'.

[85]Van der Walt 'Sommeskadeleer' 200n11; Bloembergen '*Schadevergoeding*' 106.

[86]In *Pitman v Scrimgeour* 1947 2 SA 22 (W) 35 it was 'established that he could probably have expected an income averaging £2500 over the years'; *Southern Insurance Assn Ltd v Bailey* 1984 1 SA 98 (A) 115C 'If an average expectancy or projection would be postulated'; *Roberts v London Assurance (3)* 1948 2 SA 841 (W) 848 'a high average figure'; *Botha v Minister of Transport* 1956 4 SA 375 (W) 379C/D 'at an average salary'; *Phoenix Assurance v De Wet* 1963 1 C&B 196 (A) 200 'his average annual earnings'; *Paton v Santam Insurance* 1965 1 C&B 637 (E) 645sup 'at an average over the years'; *Mrwarwaza v Rondalia Assurance* 1978 2 C&B 760 (E) 765 'This judgment must therefore assess Nozive's prospects of employment not entirely as an individual's but as a statistical probability'; *Van Rensburg v President Versekeringsmpy* 1968 2 C&B 62 (W) 64 (Inland Revenue statistics for doctors); *Van Dyk v Mutual & Federal Versekeringsmpy* 1981 3 C&B 226 (T) 228 (average earnings for blind persons).

[87]There are numerous salary surveys which provide earnings data subdivided by type of work and length of experience (for instance the *Peromnes* surveys prepared by FSA and the HSRC surveys of graduate earnings). Such surveys generally provide median and quartile earnings rather than average earnings. It seems highly unlikely that a court would go so far as to distinguish between median and average earnings.

[88]Valid provided earnings scales do not alter in real terms in time.

numerous possible occupations and at different stages in their careers.

[2.7.8] Predictions: Expected values are sometimes erroneously described as 'predictions'.[89] The dictionary meaning of the word 'predict' is 'foretell', 'prophecy', 'announce beforehand'.[90] The word 'expectation'[91] implies a degree of uncertainty which is absent from the word 'prediction'. Expected values are present utilities in relation to uncertain future events. A prophecy may give rise to an expectation, but an expectation is not a prophecy.[92] The present utility of an uncertain future event determines the manner in which I act *now*,[93] not how I will act at the time when the event is due to take place in, say, 20 years' time. Present expectations determine present decisions, **including a decision as to the amount to award now by way of damages.** Subsequent events may alter my expectations and thus lead to different decisions. It is for this reason that a court will have regard to subsequent events and make a different award at the time of trial from that which would have been made at the time of the injury or death.[94] Predictions in the mechanistic sense of 'prophecy' are only possible if the entire future has already been mapped out in one vast clockwork of cause and effect.[95] Such predestination is, however, a denial of the power of man to choose between right and wrong, it precludes a finding of fault[96] and the legal basis for an award of damages. The notion of prediction, or prophecy, is in conflict with the fundamentals of our legal heritage. I have emphasised the distinction between a prophecy and an expectation because the word 'prophecy' is sometimes misleadingly used by the courts in relation to the process of assessing damages for future loss.[97]

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[89]For example Boberg 'Judge or soothsayer' 1988 *BML* 11 '... our judges in a role essentially no different from that of a prophet or fortune teller'; Boberg 1988 *BML* 55 'The judge must do the best he can to predict the future: hence his need to don the fortune teller's mantle'; *Southern Insurance v Bailey* 1984 1 SA 98 (A) 113G 'It involves a prediction as to the future'; *Auty v National Coal Board* 'The Times' 3 April 1984 '... as a method of providing a reliable guide to individual behaviour patterns or to future economic and political events, the predictions of an actuary could be only a little more likely to be accurate (and would almost certainly be less entertaining) than those of an astrologer'.

[90]Oxford English Dictionary.

[91]For instance in *Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D one finds the expression 'verwagte verdienste'. De Finetti used the word 'prévision' in the title to his paper on the subject of the utility of uncertainty. Gasc's French Dictionary defines 'prévision' as 'forecast', 'anticipation', 'expectation', 'estimate'. The Oxford English dictionary definition of the word 'expectation' is 'awaiting', 'anticipation'.

[92]De Finetti 1937 *Al Henri Poincaré* 1 23 '*Il faut remarquer toutefois que cette "prévision de la fréquence" n'est autre chose qu'une évaluation des (chances): elle n'est nullement une prophétie*'.

[93]The primary manifestation of utility is choice between alternatives, ie utility implies a choice, action here and now (Page 'Utility Theory' 3). Do I buy at the present market price or not? Do I abandon my right to compensation for the amount offered or not? In this sense damages are no more than what the judge perceives to be a fair price between plaintiff and defendant. The present utilities of plaintiff and defendant, as perceived by the judge, determine what action, what decision, he will take.

[94]See, for instance, *Wigham v British Traders Insurance* 1963 3 SA 151 (W).

[95]Such as one finds in Greek thought.

[96]Van Rensburg 1970 *Huldigingsbundel Daniël Pont* 384 393 'Slegs die mens kan... verantwoordelik gehou word vir sy dade'.

[97]See, for instance, *Southern Insurance v Bailey* 1984 1 SA 98 (A) 113G 'Any inquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the court can do is make an estimate, which is often a very

[2.8] EXPECTED NORMAL COURSE OF EVENTS

[2.8.1] Adequate causation: Modern scientific thinking on causation has embraced the concept of prediction, in a contingent sense, according to a probabilistic set of laws.[98] German legal analysis has gone so far as to define a 'cause' to be an event which increases the risk, that is to say the chance of the result, by a significant amount.[99] An approach to causation based on the theory of chances, that is to say 'adequate causation', has received judicial recognition in South Africa,[100] although one must hasten to add that this has been done without consideration of the rigorous analysis that has characterised the German approach. The adherence to a test based on a fixed percentage chance (50%) has been harshly and correctly criticised:[101] The major objection to defining causation by reference to a fixed percentage chance of harm is that different percentages will apply in different cases, quite apart from the fact that the percentage chances will in most instances have to be determined by intuitive considerations.[102] When assessing damages for personal injury or death a gain or loss would generally be viewed as 'caused' by the injury or death if the chance thereof has been increased to a material extent. The compensation to be awarded is the increase in the value of the chance[103] for *damnum emergens*, and the decrease in the value of the chance for *lucrum cessans*, eg the chance of earnings.

[2.8.2] Expected normal course of events: Once an injury or death has been caused then there comes into being the expected normal course of events **having regard to the death, or the full known extent of the injuries**. This is compared with the expected normal course of events **had there been no injury or death**. Adverse economic events and notional early death are generally viewed as part of the normal course of events, that is to say causes of loss which will be presumed. Hart & Honoré describe such sequences as 'ongoing states'.[104]

We cannot know the precise course of the future, but we can have intimate and immediate knowledge of what we currently expect to be the normal course of events. A court may validly receive evidence as what a witness expects in the future as the normal course of

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rough estimate, of the present value of the loss'.

[98]Zellner 'Econometrics' 38-9. Scientific concepts of causation include a prediction of the frequency for occurrence of the result (see Van Rensburg *Huldigingsbundel Daniël Pont* 384 390-1).

[99]The 'adequate cause' theory of Von Kries described in Hart & Honoré 'Causation' 2ed 469 states that in assessing the chances regard should be had to what the wrongdoer knew or should have known. This was considered by the German high court to be too narrow a view (see Joubert 1965 *Codicillus* 6 10). Atiyah 'Accidents compensation & the law' 3ed 594-5 describes a quantitative approach to negligence based on financial considerations alone.

[100]In *Smit v Abrahams* 1992 3 SA 158 (C) the court uses the expression 'reasonable possibility' (ie a chance of less than 50%) for the 'real risk, one which would occur to the mind of a reasonable man in the defendant's position and which he would not brush aside as far-fetched' (at 165F - see too *S v Mbambo* 1965 2 SA 845 (A) 857E-F; *S v Daniëls* 1983 3 SA 275 (A) 332-3). At 178C the court notes an instance where 'the test of foreseeability applied was more stringent'. See too Joubert 1965 *Codicillus* 6; Snyman 'Criminal Law' 2ed 60-1 66-9.

[101]Neethling Potgieter & Visser 'Deliktereg' 2ed 173-4.

[102]ie relevant formal statistics will not be available.

[103]See 71.

[104]Hart & Honoré 'Causation' 2ed xliv 2 11 59-61 194-204 374-6.

events. The state of mind of the witness is a question of fact.[105]

[2.8.3] Supervening events: For purposes of assessing damages for future loss that which is foreseeable will normally be determined in the light of all information available at the time of the assessment. It is usual that several years elapse before a matter comes to trial. During that time a number of factors influencing the assessment of the damages will change. Inflation is likely to have persisted and prices and salaries increased. The plaintiff may have died or his employer gone out of business or a widow may have remarried. It is not judicial policy to ignore such events. When the matter comes to trial the court will avail itself of all the latest information:[106]

> 'Where there has been a change in the situation between the date of the delict and the date of the judgment this change may affect the amount of damages to be awarded'.[107]

> 'By die verhoor gekyk moet word na al die gebeure wat dit voorafgegaan het en om skadevergoeding in die lig van al die bekende feite en die werklikhede te bepaal'.[108]

The supervening information may alter the court's perception of what is foreseeable, the expected normal course of events in relation to the relevant life plan. This in turn will give rise to a changed assessment for the damages. The terminology of statistical science describes this as a Bayesian revision,[109] that is to say a prior estimate of an unknown quantity revised, made more accurate, in the light of additional information.

[2.8.4] Effect of appeal-court ruling: Once the trial court has given judgment then the court's award becomes frozen in time. If an appeal court alters the award made by a trial court then 'The order of the trial Court is set aside and there is substituted therefore the following...'.[110] The date on which the trial court hands down judgment determines a cut-off date after which no further evidence may be brought to bear upon the determination of quantum.[111] By way of contrast English law is quite unambiguous about admitting

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[105]See 19.

[106]*Wigham v British Traders Insurance* 1963 3 SA 151 (W) 156C 'The Court is entitled in the case of prospective damages to inform itself of subsequent facts which are known at the date of trial and which if taken into account would enable the Court to determine with a greater degree of certainty or accuracy the actual loss of a plaintiff. By so doing the amount of speculation involved in such an assessment is reduced'. See too Boberg 1964 *SALJ* 194 199-200; Boberg 'Delict' 487; Corbett & Buchanan 3ed 10-11; Davel 'Broodwinner' 194-7 509-10. Scott 'Oorerflikheid van Aksies' 212 suggests that the cut-off date should be *litis contestatio*.

[107]*Sigournay v Gillbanks* 1960 2 SA 552 (A) 557G.

[108]*General Accident Insurance v Summers* 1987 3 SA 577 (A) 615C.

[109]Levin 'Statistics for Management' 2ed 156-62.

[110]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 121sup. *General Accident Versekeringsmpy v Bailey* 1988 4 SA 353 (A) 360.

[111]*Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 915A 'It appears that the plaintiff died before the hearing of this appeal'; in *Legal Insurance v Botes* 1963 1 SA 608 (A) the appeal court was not notified of the plaintiff's prior death and experienced some degree of embarrassment from subsequent press reports; *De Villiers v Maursen Properties (Pty) Ltd* 1983 4 SA 670 (T) 678A 'Evidence not before the Court *a quo* and subsequent to the granting of the order

before an appeal court evidence of events supervening since date of judgment.[112]

[2.8.5] Causation by facilitation: A supervening event may be a delictual act by a third party. In general the damage suffered by the plaintiff will then be apportioned between the first and the second wrongdoers.[113] Sometimes, however, the original injuries of the victim may be viewed as the cause of the subsequent incident and the associated financial loss becomes an addition to the primary loss.[114] In this latter instance one would say that the original injury has facilitated, that is to say increased the risk, of the subsequent incident. In other words the subsequent event was foreseeable in the normal course of events, having regard to the injury or death.[115]

[2.9] MARKET VALUE

[2.9.1] Communal utility: Personal utility in its most subjective form is generally not measurable with sufficient reliability to satisfy the needs of a court of law. For purposes of justice between man and man, and man, the public nature of the law courts requires a publicly demonstrable standard of value. Voet states in this regard:[116]

> 'It is beyond doubt that, when ascertaining the loss suffered, account is taken of the communal value for the patrimonium, not the claimant's personal evaluation.'

Van der Walt[117] has expressed this principle in more modern, if perhaps roundabout language:

> 'Aangesien dit in verband met die skadevergoedingsregtelike vermoënsbegrip altyd moet gaan om die bevrediging van *erkende* behoeftes, moet die betrokke goed se nuttigheid vir die bevrediging van die vermoënsubjek se behoeftes sodanig wees dat daardie goed deur van sy regsgenote aangesien sal word as nuttig vir daardie doel, welke doel ook vir hulle bevredigingswaardig voorkom. Dit kan derhalwe gesê word dat die nuttigheid van die betrokke goed vir bevrediging van die vermoënsubjek se behoeftes, én daardie behoeftes as sodanig, 'n verkeerswaarde moet hê. Só beskou is die vermoënswaarde van iets gelyk aan die verkeerswaarde van die nuttigheid van

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cannot be introduced'. Contra *AA Mutual Insurance v Van Jaarsveld (1)* 1974 2 C&B 360 (A) 'Since the trial a strong possibility has emerged...'.

[112]*Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL) 914f-h.

[113]*Bekker v Constantia Insurance* 1983 1 PH J13 (E); *Minister of Communications & Public Works v Renown Food Products* 1988 4 SA 151 (C); Cooper-Stephenson & Saunders 'Damages in Canada' 626-635; Hart & Honoré 'Causation' 247n3&4.

[114]*Smith-Wright v Van der Linde* 1954 1 C&B 454 (SR); *Mair v General Accident Fire & Life Assurance* 1970 3 SA 25 (RAD) 27A-B; *Oelofsen v Cigna Insurance* 1991 1 SA 74 (T). Medical negligence is commonly occasion for such an inquiry (see Luntz 'Damages' 2ed 127-8 132-4; Cooper-Stephenson & Saunders 'Damages in Canada' 626-35). See Neethling Potgieter & Visser 'Deliktereg' 2ed 187-9 concerning *novus actus interveniens*.

[115]See too section 11.9.

[116]Voet *Ad Pandectas* 45.1.9 '*Illud extra dubium est, in definiendo eo quod interest, neutiquam affectionem peculiaris rationem habendam esse, sed communem, ut ita dicam, affectionem oportere spectari*'.

[117]Van der Walt 'Sommeskadeleer' 280-1.

> daardie goed vir bevrediging van die vermoënsubjek se erkende behoeftes in ooreenstemming met die wyse waarop hy sy vermoë vir daardie doel planmatig struktureer. Die vermoënsubjek is dienooreenkomstig in die posisie dat hy die vermoënsgoed ter bevrediging van sy besondere behoeftes planmatig só kan inspan dat aan sy vermoë 'n subjektief - funksioneel gestruktureerde eenheidsgestalte gegee word.'[118]

We may here discern the basic elements of a utility value ('nuttigheidswaarde') which must not only be recognized by our fellow men in the legal sense ('regsgenote') but which must also have a communal value ('verkeerswaarde'). Both conditions must be satisfied. Thus prostitution may have a value in exchange ('verkeerswaarde') but this value will not be recognized for compensation purposes.[119] Van der Walt seems rather to overstate his point when he says that the utility of the goods, and the need for them, must have a value in exchange.[120] Needs ('behoeftes') give rise to utility ('nuttigheidswaarde') but do not themselves have value independent of their associated utility.[121] The notion of a life plan ('planmatigheid') lends cohesion to the patrimonium in the sense of a 'co-ordinated going concern' rather than a haphazard agglomeration of assets and liabilities, hopes and fears. I will for the moment defer further discussion of just what is a 'patrimonium'. For the moment let us focus upon value in exchange ('verkeerswaarde'), the outward and discernible manifestation of numerous diverse private utility values held by various members of the community.

The most common manifestation of communal utility is the market value of the goods. In an active commercial environment one finds a communal concept of value for exchange of ownership and exchange of use. Transfer of ownership for value is generally effected by means of sale or barter. Exchange of use is effected by means of lease. The use of money is generally exchanged by lending it at interest. The concept of 'market value' requires closer examination:

[2.9.2] Imperfect information: Where goods are actively traded in a market there comes into being a certain degree of consensus as to a fair monetary value for the goods, the 'market value'. I say 'a certain degree of consensus' because it is rare that there is absolute clarity as to the precise market value of any trade goods at any one point in time.[122] When prices are fixed by monopoly or official decree then one may identify a fixed price. However, where market forces are allowed to operate there tends to be a range of prices at which trading takes place during any one day. One has only to consider stock exchange prices

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[118]Neethling Potgieter & Visser 'Deliktereg' 2ed 208n76 criticise this statement by Van der Walt on the grounds that 'Dit is noodwendig 'n kenmerk van vermoënskade dat die betrokke bate en die nadeel direk in geld waardeerbaar moet wees'. This is, of course, what Van der Walt is saying but in a very much more generalised utilitarian way.

[119]The principle applies to damages for personal injury (*Dhlamini v Protea Assurance* 1974 4 SA 906 (A)) and to damages for loss of support (*Santam Insurance v Ferguson* 1985 4 SA 843 (A)).

[120]'die nuttigheid van die goed, *én daardie behoeftes*, 'n verkeerswaarde moet hê'.

[121]Neethling Potgieter & Visser 'Deliktereg' 2ed 208n76 remark upon Van der Walt's abstract concept of functionality independent of money value.

[122]Neethling Potgieter & Visser 'Deliktereg' 2ed 230n223 note the difficulty that can be experienced with the determination of market value.

which have the unusual feature that price information is immediately and publicly available. This is not always so.

[2.9.3] Expected prices: If price information is difficult to come by the range of prices at which trading takes place will generally widen. Even in an erratic market, such as residential property, the house brokers, property salesmen, will have fairly clear ideas as to the value of most properties. This concept of value amongst the 'experts' will tend to determine the prices at which trading takes place. It is likely, however, that no two property brokers will fully agree as to the market value of any particular property, but they will probably arrive at values which are broadly similar. Market value in this sense is **the price at which a sale is expected to take place** if the property in question was traded at that point in time. If the property has been recently traded, that price may be a true reflection of market value. It is common, however, for an actual price to be described as 'a bargain' or 'excessive'. Such comments reflect a concept of value different from that at which actual sales take place. There is a form of mental averaging in the concept of 'fair market price'.

[2.9.4] Hypothetical value: The main point I make here is that market value reflects the *expected* price at which trading would take place. Market value is for most situations itself hypothetical. This is particularly so in actions for damages where the goods have been used or have aged or have been damaged. The market for such goods will generally be one where price information is difficult to come by. Even when the claimant has sold the goods the price obtained is not necessarily conclusive of market value.[123] I emphasise this point because commentators, such as Van der Walt,[124] have developed theories of compensation based on the notion that certainty is possible, if only we can wait to allow unfolding reality to resolve our doubts. In practice, day-to-day commercial life is fraught with inadequate information and hypotheses as regards prices.[125] In this sense the trader making a business decision is in very much the same position as a court called upon to assess damages on the basis of inadequate information.[126]

[2.9.5] Immediate replacement of damaged goods: Market value, the price at which goods will be traded, provides a measure of communal utility. If goods have a higher utility to a person than the price at which they can be purchased in the market then he becomes a potential buyer. Conversely if the goods have lower utility than the money for which they can be exchanged then the owner becomes a potential seller. If too many persons seek to sell then, in a free market, the price should decline until buyers and sellers are once again balanced. Actions for damage to goods have the important characteristic that the claimant

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[123]See, for instance, *Cowley v Hahn* 1987 1 SA 440 (E) and discussion thereof by Sharrock 1987 *SALJ* 229; see too *Erasmus v Davis* 1969 2 SA 1 (A) 6H 8.

[124]Van der Walt 'Sommeskadeleer' 291 et seq.

[125]See, for instance, comments in *Erasmus v Davies* 1969 2 SA 1 (A) 7G-H; Sharrock 1987 *SALJ* 229-32; McGregor 'Damages' 14ed 193.

[126]A court cannot decline to make an assessment by reason of paucity of evidence (*Arendse v Maher* 1936 TPD 162 165; *Sandler v Wholesale Coal Suppliers* 1941 AD 194 198; *Roxa v Mtshayi* 1975 3 SA 761 (A) 769-70; *Parity Insurance v Van der Merwe* 1967 1 PH J17 (A)). However, a claimant who fails to lead available evidence may be non-suited (*SA Eagle Insurance v Cilliers* 1987 3 C&B 716 (A) 728; *Hendricks v President Insurance* 1993 3 SA 158 (C)).

at the time of the wrongful act preferred to own goods rather than their equivalent in money.[127] From this we may conclude that, as a general rule, the utility of the goods to the claimant was more than the utility of the money for which those goods could have been exchanged. If market value is taken as the basis for compensation then we can conclude that the claimant gets less utility by way of compensation than he enjoyed when he possessed the goods. This use of market value may be justified if the claimant is provided with sufficient compensation money to buy substitute goods.[128] If such substitute goods are purchased immediately after the damaging of the original goods then the claimant's loss becomes a loss of money and not a loss of the utility of the goods.[129] In general a plaintiff is expected to mitigate his damages by purchasing substitute goods as soon as is reasonably possible.[130] Many claimants do not have the financial resources to acquire substitute goods until after compensation has been paid. Those claimants who do have the financial resources will commonly find that immediate replacement is just not possible at a cost which approximates to the 'market value' of the goods which have been damaged. Replacement cost is not necessarily equal to the price which the claimant could have got for the goods had they been sold immediately prior to the event causing damage. The market for motor vehicles provides a good example of wide differences between acquisition costs and the price obtainable on disposal, the 'trade-in' value. In *Wikner v TPA*[131] the court refused to add general sales tax to the damages suffered despite the fact that if the claimant had actually purchased substitute goods he would have incurred this cost.

[2.9.6] Disutility of effecting replacement: Quite apart from the question of the price payable the acquisition of substitute goods[132] requires effort on the part of the claimant. It may take days, weeks and even years of diligent effort to acquire substitute goods. Such effort is of the same nature as work. To the extent that such work has disutility the claimant's overall utility has been reduced. Even if the claimant does succeed in replacing the goods shortly after the delict he will suffer a loss of the use of the money spent. With breach of contract the claimant will often have the use of the purchase price that he would otherwise have paid. Such persons suffer little or no loss of use of money. It is otherwise when goods have been so badly damaged as to be unusable. The question of damages for loss of use, particularly of money, is a topic with which I will deal in due course.[133]

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[127]The effort of selling goods may have substantial disutility. It is possible that the utility of goods to a person is less than the utility of the monetary value of the goods but more than the combined utility of market value less the disutility of selling.

[128]Bloembergen '*Schadevergoeding*' 53. But see discussion at 163 below.

[129]Bloembergen '*Schadevergoeding*' 55 mentions the notion that the loss of the goods is replaced as at the date of delict or breach with the sum of money which may be claimed by way of compensation. Such a rule can only be justified on grounds of mitigation. A claimant can only be expected to mitigate his damages in this manner if replacement was reasonably possible. See further discussion at 163 below.

[130]The market-value rule and the associated duty of mitigation are comprehensively discussed in *Asamera Oil Corp Ltd v Sea Oil & General Corp* (1978) 89 DLR (3d) 1 (SCC). See too *Modimogale v Zweni* 1990 4 SA 122 (B).

[131]1992 (T) (unreported 4.6.92 case no 17826/91). See 168 below for further discussion.

[132]And damages in court.

[133]See 163.

[2.10] SUBSTITUTES FOR MARKET VALUE

[2.10.1] Hypothetical objective values: So far I have emphasised market value as a measure of utility. In damages theory, market value is the cost of replacing the goods damaged. In practice the imperfections of the market compel the court to adopt a notional market value, that is to say the expected, or perhaps 'deemed' cost of replacement. We shall now turn to the problem of establishing a value in exchange for utilities for which there is no direct evidence of market value **in the sense of a present lump-sum value**. Major classes of present utility with which we are here concerned include earning capacity, future expenses (medical and other), entitlement to support, and the *spes* of inheritance.

Reinecke[134] proposes the use of a realistic, albeit subjective, value and would seem to have in mind the intuitive assessment of value of a chance.[135] Van der Walt[136] paraphrases this as a value recognised by our fellow men,[137] and adds the requirement of legality.[138] Savage[139] gives a different perspective when he states that:

> 'A probability is a price, in a manner of speaking'.

Such prices, as I have observed,[140] can be elicited by a general interrogation, typically by cross examination of experts in court. Alternatively use can be made of surrogate markets,[141] such as the prices for life annuities. Van der Walt's primary objection seems to be his perception of insurmountable difficulty of assessment. It is well established, however, that difficulty of assessment does not mean that the court may adopt a *non possumus* attitude and decline to award damages.[142] The fact that the courts have frequently assessed damages in the face of limited information suggests that the problems are not insurmountable. Van der Walt has here clearly overlooked the distinction between restitution and compensation. Restitution implies a perfect reconstruction of what would have been. Compensation requires merely a fair equivalent.[143]

Earning capacity is the ability of a person to exchange his services and skills for money or monetary equivalent. The standard commercial measure of value is earnings, a salary or

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[134]Reinecke 1976 *TSAR* 26 31 'realistiese indien subjektiewe waarde'.

[135]'In the present case I do not propose to express the possibility... in terms of a precise percentage. I intend merely to award an amount in respect of the total cost... which will take account of the extent of the possibility and the various imponderables...' *Blyth v Van den Heever* 1980 1 SA 191 (A) 226C.

[136]Van der Walt 'Sommeskadeleer' 272-3.

[137]'regsgenote'.

[138]Damages will not be awarded if the earnings were derived from an illegal activity (*Dhamini v Protea Assurance* 1974 4 SA 906 (A) 915B 917E); see 267 below.

[139]Savage 'Bayesian Econometrics' 111 112.

[140]See 11.

[141]Pearce 'Cost-Benefit Analysis' 10-11; *Todd v Administrator, Transvaal* 1972 2 SA 874 (A) 885D (comparable prices for similar lands).

[142]See footnote 126.

[143]See paragraph 3.3.3.

wage. Earning capacity is only very rarely exchanged for a lump sum.[144] Some persons, such as entrepreneurs or inventors or prospectors, may work for many years to achieve a single substantial capital gain. Such events are too scarce in the marketplace to provide much assistance as to a lump-sum standard of value for earning capacity. Loss of support claims are concerned with the share of the deceased's earnings expected by the dependant.

[2.10.2] The forensic exchange: The courts, with their lump-sum awards for loss of earning capacity, provide the most active commercial exchange where lump sum values are explicitly quoted.[145] The legal procedures by which the lump sums are determined tend to emphasise that evidence of commercial value is drawn from sources extraneous to the courts, particularly of wage levels. This ensures consistency between judicial awards and the commercial environment. A similar reliance on the opinions of experts enables the courts to remain in touch with social and scientific developments. Notwithstanding all this evidence the 'forensic exchange' creates its own standard of value. That is the nature of a specialist market.[146] The most obvious area where the courts create their own standard of value is with conventional damages, general damages for pain and suffering and loss of the amenities of life. These are determined by and large by reference to previous awards.[147] Just as, if I wanted to sell my home, I would seek out information as to the prices paid in recent sales and pitch my asking price accordingly.

[2.10.3] Rebuttable presumptions: The conventions of the 'forensic exchange' extend well beyond the customary pricing of damages for pain and suffering and loss of amenities. Some of the conventions are entrenched as rules of law.[148] Most are less rigid in application and serve to fill gaps created by inadequate evidence.[149] This latter class has the quality of rebuttable presumptions which give way to explicit evidence, if plaintiff or defendant chooses to make such available.[150] The rebuttable conventions thus reflect an abstract approach to assessment which may be concretized by more detailed evidence.

[2.10.4] The market value of work: As I have noted the standard communal measure of a man's earning capacity is the wage which he can command. That, of course, is a measure of the utility of a man's earning capacity to the person paying the wage. The utility of the

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[144]The closest that commercial practice comes to a lump-sum payment in exchange for earning capacity is the price of a restraint of trade agreement. One might also cite the 'purchase' of a football player by a football club. Even if such transactions did reflect fair value for a lifetime's earnings they are sufficiently rare that one cannot say that a lump-sum market value for earnings is thereby established.

[145]Strictly speaking it is not earning capacity which is exchanged but the right to bring further claims against the defendant.

[146]eg war medals, stamps, vintage cars, etc.

[147]Visser 1988 *THRHR* 468 485inf 'Daar het dus onteenseglik 'n kommersialisering van sekere hoogspersoonlike belange plaasgevind'; Munkman 'Damages' 4ed 18-19; *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 841E.

[148]Vide the rules governing collateral benefits: *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A); *Dippenaar v Shield Insurance* 1979 2 SA 904 (A).

[149]For example: SA population life tables are used as the basis for mortality and general contingencies are deducted.

[150]The convention under the dependants' action to apportion family income with two parts to each adult and one part to each child provides a fine example.

wage to the workman is determined by the extent to which that wage can be used to fulfil needs. As will be discussed later[151] this requires that tax be deducted from earnings. One is left with a net income which may then be projected over many years into the future. The projected income provides a measure of the utility of the man's earning capacity, but only in the form of yearly or monthly packets of utility. The problem facing a court subject to the once-and-for-all lump-sum rule is the conversion of a time-dependent series of packets of utility into a single lump sum payable immediately which has substantially equivalent present utility.

[2.10.5] Discounting to present value: In performing this capitalization the court needs to bear in mind a number of factors influencing utility. Foremost is the consideration that an amount payable at some future date, say 20 years' time, has substantially less utility than the same amount payable immediately. The difference is measured by the discount for interest.[152] As an offset against this discount for interest is the consideration that wages and prices will increase over the years due to the effects of inflation. The prospect of wage and price increases, inflation, enhances the utility of net earnings 20 years from now. The prospect of death intervening during the 20 years reduces the utility, as too does the prospect of unemployment. Considerations of possible promotions or successful establishment of one's own business may well increase the utility of net earnings 20 years ahead. Each of these different elements needs to be weighed, one against another, in arriving at a fair present value.

[2.10.6] Quot homines tot sententiae: One thing is certain, the present utility of a prospective gain or loss 20 years from now will be assessed very differently by different persons. Some will emphasise the risk of intervening death, some will overstate the discount for delay (interest), some will overstate the effects of future inflation. There will be others who will underrate these considerations. Typically the chance of early death will be largely ignored by many persons. If agreement is to be reached as to present value in face of these different perceptions then it is necessary that practical communicable procedures be adopted for the objectivization of present utility. In the absence of rules of assessment all is confusion.

[2.10.7] A general norm: I have already quoted Voet's statement[153] that for purposes of assessing compensation regard must be had to the '*affectio communem*' and not the '*affectio peculiaris*'. The *affectio peculiaris* is the personal subjective assessment of value, the present utility of the claimant. For Voet the *affectio communem* means not the market value of the *res* in the commercial sense but rather that 'the plaintiff's loss is to be assessed by a general norm'.[154] The first norm which comes to mind is the principle of restitution, to put the plaintiff in the position he would have been in. In general, however, restitution is not possible and the award of damages is no more than compensation, a monetary substitute for

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[151]See 231.

[152]See 125.

[153]Voet '*Ad Pandectas*' 45.1.9. See 22.

[154]Erasmus 1975 *THRHR* 104 115 269n111.

the utility which has been lost.[155] This phenomenon is most obvious with general damages for pain and suffering and loss of the amenities of life. The phenomenon arises equally, albeit less obviously, with uncertain financial loss.[156] I discuss at some length below that once a deduction has been made for risk it matters not how diligently the plaintiff invests his money, when the time comes, if it can ever come at all,[157] the award will be either too much or too little.[158]

[2.10.8] Insights from expropriation: Bloembergen[159] observes that although the problems of compensation for expropriation of immovable property differ in many ways from the problems of assessing damages, nonetheless a comparative study can be enlightening. Barwick CJ in Australia[160] has likened the assessment of earning capacity to the valuation of rental property. As regards expropriation it has been said that:

> 'The word "value", as pointed out by writers on Political Economy, has two meanings. It sometimes expresses the utility of some particular object (which is called value in use) and sometimes the power of purchasing other goods, which is its value in exchange'.[161]

It is important to draw a distinction between the activities of 'valuation', the estimation of value in exchange, and 'investment analysis', the determination of value in use by the prospective purchaser.[162] The latter value determines whether or not the market value is attractive to a potential purchaser. In order to objectivize the 'investment analysis' it is necessary to introduce the concept of multiple potential purchasers to determine a notional value in exchange.[163] With objectivization the activity becomes a 'valuation'. Van der Walt[164] points to the relevance of a group norm. 'Investment analysis' will usually take the form of discounting expected future rentals and expenditure to present value.[165]

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[155]Munkman 'Damages' 4ed 1-2; Bloembergen '*Schadevergoeding*' 48 114; Van der Walt 'Sommeskadeleer' 65 157 280 285; Erasmus 1975 *THRHR* 104 106 'Historically, the sum of money of the judgment is probably to be explained as the price of redemption from liability, that is, the monetary composition offered to the victim in order to save the wrongdoer from the harshness of personal execution'.

[156]Van der Walt 'Sommeskadeleer' 270 notes that uncertainty is the major obstacle to the assessment of hypothetical events.

[157]Some contingencies such as the longevity of a breadwinner had he died or the future promotions of an injured man can never be resolved by waiting.

[158]'There is really only one certainty: the future will prove the award to be either too high or too low' *Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL) 914 c-d.

[159]Bloembergen '*Schadevergoeding*' 6.

[160]*Atlas Tiles v Briers* (1978) 21 ALR 129 (HC) 136 quoted at 215.

[161]*Pietermaritzburg Corporation v SA Breweries* 1911 AD 501 522.

[162]Jonker 'Property Valuation' 5-6.

[163]*Todd v Administrator, Transvaal* 1972 2 SA 874 (A) 882A.

[164]Van der Walt 'Sommeskadeleer' 280 '... dat daardie goed deur van sy regsgenote aangesien sal word as nuttig vir daardie doel, welke doel ook vir hulle bevredigingswaardig voorkom'.

[165]Jonker 'Property Valuation' 88-96 99.

The concept of 'potential value' contemplates the highest and best use of the property. A large block of offices might, for instance, be let at below-market rentals thus affording a potential of higher profitability at the expiry of the existing leases. The highest and best use must be probable, not merely possible, as judged by an informed developer.[166] In like manner 'earning capacity' is determined by reference to 'probable'[167] or 'expected'[168] earnings. 'Potential value' includes the value of the chance of enhanced value.[169]

[2.10.9] Expected advantages and disadvantages: The decision to purchase a house implies the foreseeability of the utility of the house to the purchaser including the possibility of a subsequent sale. Foresight as to the lettability of an office block and the expenses of maintenance will influence the price which a purchaser is prepared to pay. In both cases foresight, that is to say prediction in a contingent sense, is required as to the expected future income and expenses to be generated by the asset. Value in general is determined by foreseeability and the associated perceptions of the buyers and sellers regarding the course of future events.[170]

The foresight that a businessman has of the future course of rentals and expenses is the same foresight that is required of a court when assessing compensation for future loss of earnings or support. It has been said that the determination of a lump-sum value for earning capacity is very similar to the determination of the price to pay for lettable property.[171] The value of lost earning capacity is usually determined by reference to what the victim 'would probably have earned', as distinct from what he 'could have earned' if earning capacity had been optimally utilised.[172] The expression 'verwagte verdienste',[173] expected earnings,[174] describes the concept more accurately than does 'probable earnings'. The statistical concept of an expectation implies an average of different possible earning scenarios each weighted with the separate chance of its realization.[175] Foreseeability and the

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[166]Jonker 'Property Valuation' 49n12 56.

[167]*Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1020G.

[168]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D.

[169]*SBI v Connan* 1974 3 SA 111 (A) 117F (mineral rights).

[170]Bloembergen '*Schadevergoeding*' 73 '*De mogelijkheden, die de zaak voor de toekomst nog bood, hadden zich in die waarde geconcretiseerd*'.

[171]*Atlas Tiles v Briers* (1978) 21 ALR 129 (HC) 136; *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 917B 'The capacity to earn money is considered to be part of a person's estate'. The significance of this statement is apparent if one appreciates that earning capacity is a right of personality but that the present capitalized value of expected future earnings is an asset in the extended patrimonium. The perception of earning capacity as a lump-sum asset is also evident in *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 150C 'Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie' (cited with approval in *Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D).

[172]*Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1020G.

[173]*Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 150C.

[174]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 115C 'If an average expectancy or projection would be postulated...'.

[175]Levin 'Statistics for Management' 2ed 192-4; for a calculated example see Koch 'Damages' 53.

statistical concept of an expectation have much in common. A statistical expectation is defined in terms of frequency ratios, hypothetical or historically observed. That which is expected in the sense of 'foreseeable by the reasonable man' incorporates subjective perceptions of the relevant chances.[176] Both involve a weighing up of the various future possibilities and the choice of a suitable middle path as a basis for decision making.

[2.10.10] The morality of logic: Market value, or the cost of repairs, are the most obvious bases for assessing the utility of what has been lost. Less obvious norms of assessment are the rules by which capitalization is effected. Such norms include for example the use of life tables, the apportionment of family income between dependants with one part to each child and two parts to each parent, and the addition of inflation when estimating future amounts. Finetti[177] has pointed out that because of the diversity of personal perceptions of utility agreement between men dictates that use be made of averages and logic, if agreement is to be reached at all. Our perceptions of the future are substantially influenced by our personal experiences of the past and are in a constant state of revision.[178] Ramsey[179] points out that 'logic is concerned not with what men actually believe, but what they ought to believe, or what it would be reasonable to believe'. Logic ensures that our beliefs are consistent. In this sense logic has moral overtones.[180]

[2.10.11] Four elements of assessment: For the measurement of utility Bentham, the first major exponent of utility theory, identified four key elements: intensity, duration, certainty or uncertainty, and remoteness.[181] These echo the key elements of the standard actuarial calculation: Intensity can be identified with the level of earnings or support. Duration corresponds with the period of the loss if uncertainties such as mortality are ignored, that is duration contemplates a period to age 99, the limit of life.[182] Uncertainty is accounted for in the deduction for contingencies and the technique of valuation of a chance. Remoteness finds expression in the discount for interest, the adjustment for the time value of money. It is appropriate to recall in this regard Grotius' statement[183] that losses which are uncertain and remote in time are worth less than those that are certain and immediate.

[2.11] 'ABSTRACT' AND 'CONCRETE' DAMAGES

[2.11.1] Definition: The use of market value at date of delict, or even date of trial, will usually be materially different from the utility that has been lost by reason of the delict or

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[176]Such as are described by Ramsey 'Foundations of Mathematics' 166-84; Savage 'Bayesian Econometrics' 111.

[177]De Finetti 1937 *Annales de L'Institut Henri Poincaré* 1 16-24.

[178]De Finetti 1937 *Annales de L'Institut Henri Poincaré* 23-4. Supervening events and the associated Bayesian revisions have been dealt with under causation (see 20 above).

[179]Ramsey 'Foundations of Mathematics' 193.

[180]Ramsey 'Foundations of Mathematics' 184-98.

[181]Page 'Utility Theory' 17 33.

[182]See paragraph 5.1.1. Visser 1986 *De Jure* 207 217-18 records the *per diem* approach to assessing general damages.

[183]Grotius *Inleiding* 3.32.16.

breach. For this reason damages based upon market value are described by Bloembergen[184] as 'abstract', as distinct from 'concrete damages'[185] when full account is taken of the detailed circumstances of the claimant.

[2.11.2] Sentimental value: Bloembergen's terminology is to be preferred to the more confusing terminology of 'objective' damages and 'subjective' damages. Subjectivity is a relative concept. As a general rule damages preclude the subjectivity of the claimant, his personal utilities, but are strongly influenced by the subjectivity of the presiding judicial officer. The subjective condition of the claimant is only recognised to the extent that it is outwardly discernible and verifiable by others. The Roman jurists cited the example of the slave who was the natural son of the owner. If the slave were injured or killed the damages were assessed according to the market value for such slaves in general without regard for the higher price which the father/owner would have been prepared to pay for that slave in the open market.[186] This focus upon market value, to the exclusion of the true utility of the goods to the plaintiff, has ostensibly persisted into the modern South African law: 'Any element of attachment or affection for the thing damaged was rigorously excluded'.[187] The question of sentimental loss affects, if anything, the assessment of general damages for pain and suffering and loss of the amenities of life. Patrimonial loss is essentially concerned with financial loss. The associated emphasis upon provable rand values tends to preclude consideration of personal utilities, sentimental and similar forms of added value, except where such sentimentality is generally recognised as affecting value. One may cite the examples of a vintage car, or a pop singer's personal possessions, as examples of a communal sentimentality creating economic value. The sources of economic value are deeply seated in the human psyche and its effect on human need, with all attendant irrationality and unpredictability.

[2.11.3] Judicial ambivalence: It has been said that 'abstract' damages do not satisfy a refined sense of justice.[188] Concretization, however, requires time-consuming interpretation of complex and subtle facts.[189] An abstract measure of damages fulfils the needs of practice better than a concrete measure. That is to say that an abstract approach permits greater efficiency of claims handling than does a concrete approach.[190] It has also been

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[184]Bloembergen '*Schadevergoeding*' 10 36 45-6 48-52 54 58-9 69 75-7 79 83 86 105 108 113; Van der Walt 'Sommeskadeleer' 188 198 202 205 214 216.

[185]Reinecke (1976 *TSAR* 26-56; 1988 *De Jure* 221-38) uses the expression 'konkrete skade' in a very different sense from that used by Bloembergen. Bloembergen's concept of 'abstract damage', reduction in market value, would seem to come closest to what Reinecke has in mind with 'konkrete skade', an ideal measure free of considerations of causation.

[186]D9.2.33.

[187]*Union Government v Warneke* 1911 AD 657 665; *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 917. Most writers would exclude an addition for sentimental value: Van der Walt 'Sommeskadeleer' 60 74 132.

[188]Erasmus 1975 *THRHR* 104 107; Bloembergen '*Schadevergoeding*' 38.

[189]Bloembergen '*Schadevergoeding*' 39.

[190]In *Todorovic v Waller* (1981) 37 ALR 481 (HC) the high court of Australia laid down a 3% net capitalization rate for all future compensation matters and prohibited the leading of evidence concerning interest, inflation and taxation. This resort to an abstract measure was clearly motivated by considerations of forensic efficiency.

said that practitioners prefer to work with rough well-defined measures rather than sophisticated rules which are difficult to apply.[191] The date-of-delict rule[192] and the collateral benefit rules[193] provide examples of this preference. When a court insists on a concrete approach to damages this can have the effect of denying reasonable compensation: By way of example one may observe the general reluctance of the courts to award compensation for the temporary loss of the use of money.[194] In such circumstances excessive zeal for a concrete measure has the effect of increasing the burden of proof, sometimes insurmountably. An emphasis upon concretization stands in sharp contrast to the general principle that compensation will not be denied for lack of evidence if it may reasonably be inferred that damage has been suffered.[195] In general the burden of proof required for damages for personal injury and death will be less stringent than for purely commercial claims such as breach of contract and damage to motor vehicles.[196]

[2.11.4] Abstraction of future loss: When Bloembergen writes of abstract damages[197] he has in mind the market value of damage to the *res* as at date of delict or breach, to the exclusion of consequential loss. A concrete approach to damages implies an award for consequential loss and the assessment of value as at the date of the trial. Bloembergen's text is concerned with the simplest situations where uncertainty is largely excluded and full evidence is available, if required. When dealing with future loss, and, for that matter, uncertain past loss, it is convenient to extend the concepts of abstract and concrete. The use of a statistical average, such as a life table, is essentially an abstract approach to damages necessitated by the lack of knowledge as to the precise date that the claimant will die. If one knows the actual date of death then one is able to concretize the damages for future loss with considerably more accuracy. This is but one example of the compromise in the assessment of damages between concretization and abstraction, dictated by the availability of suitable evidence. Abstraction is avoided as far as possible by 'personalizing' the averages into

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[191]Bloembergen '*Schadevergoeding*' 48.

[192]*Philip Robinson Motors (Pty) Ltd v N M Dada (Pty) Ltd* 1975 2 SA 420 (A) 429F 428G-H; *Voest Alpine Intertrading Gesellschaft MBH v Burwill & Co* 1985 2 SA 149 (W); *General Accident Insurance v Summers* 1987 3 SA 577 (A) 613B-D. Bloembergen '*Schadevergoeding*' 55 62 motivates the date-of-delict rule on the grounds that from that date the claimant has a claim for damages in lieu of what has been lost.

[193]*Klingman v Lowell* 1913 WLD 186 (gratuitous board and lodging provided by parents); *McKenzie v SA Taxi-Cab Co* 1910 WLD 232 (insurance benefits ignored); *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) (gratuitous benefits); *Mutual & Federal Insurance v Swanepoel* 1988 2 SA 1 (A) (military pensions); see 179 below. An abstract measure of damages dictates that collateral benefits be ignored (Bloembergen '*Schadevergoeding*' 52).

[194]See, for instance, *Broderick Properties (Pty) Ltd v Rood* 1964 2 SA 310 (T) 316A-F (evidence of likely application of funds not led); *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) (interest on damages prohibited). A discount for interest will, however, be applied to future losses without the need to lead evidence (see, for instance, *New India Assurance v Naidoo* 1950 (A) (unreported 19.5.50); *Protea Assurance v Matinise* 1978 1 SA 963 (A) 975E-F).

[195]See footnote 126.

[196]Bloembergen '*Schadevergoeding*' 39. Similar considerations lead to a relaxation of the foreseeability test and the award of compensation to the man with the so-called 'egg-shell skull' (Neethling Potgieter & Visser 'Deliktereg' 2ed 189-91. Boberg 'Delict' 278-9 283 303-8 445 459 464; McGregor 'Damages' 14ed 105-115; Munkman 'Damages' 4ed 38-9).

[197]Bloembergen '*Schadevergoeding*' 10 36 45-6 48-52 54 58-9 69 75-7 79 83 86 105 108 113; Van der Walt 'Sommeskadeleer' 188 198 202 205 214 216.

'expectations'.[198]

[2.11.5] Formalisms of assessment: The practical administration of justice requires recognition of an abstract measure of damages. For Bloembergen this means adopting the market value as at date of delict.[199] For personal injury and death this means partial abstraction through the use of life tables, salary averages, expected investment returns, remarriage statistics and division of family income between dependants with two parts to each adult and one part to each child. All these measures are but abstractions, formalistic substitutes for the true facts. Unlike the South African courts the English courts give explicit recognition to abstract guidelines of this nature:[200]

> 'A guideline as to quantum of conventional damages or conventional interest thereon is not a rule of law nor is it a rule of practice. It sets no binding precedent; it can be varied as circumstances change or experience shows that it does not assist in the achievement of even-handed justice or makes trials more lengthy or expensive or settlements more difficult to reach. But though guidelines should be altered if circumstances relevant to the particular guideline change, too frequent alteration deprives them of their usefulness in providing a reasonable degree of predictability in the litigious process and so facilitating settlement of claims without going to trial'.

The purpose of guidelines is thus to create predictability, to facilitate settlements, to shorten trials and reduce costs.[201] These are the practical justifications for an abstract approach to damages.[202]

[2.11.6] A right to concretize: On the other hand it is equally clear that every plaintiff should have the right to a proper hearing, that is to damages based on a concrete measure. Conversely it seems to follow that every defendant should also be entitled to a full hearing should he feel dissatisfied with a purely abstract approach to assessment. Under the ideal system of justice the abstract measure would provide *prima facie* evidence of loss. Both plaintiff and defendant would then entitled, should they so wish, to challenge the abstract measure and introduce a greater or lesser degree of concretization by way of explicit evidence. A failure to invoke this right would constitute a tacit acceptance of the abstract

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[198]Thus, for example statistics from the standard life table may be adjusted in the light of special circumstances (*Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 721-2 - evidence of unusual longevity; *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1024-7 - evidence of increased risk of early death).

[199]The rationale being that at date of delict the plaintiff loses the goods but obtains a right of action for the value of those goods at the moment of destruction; see *Summers v General Accident Insurance* 1985 3 SA 418 (C) 420B-D for an indication that a similar abstract measure prevails in South African law.

[200]*Wright v British Railways Board* [1983] 2 All ER 698 (HL) 705j.

[201]In *Todorovic v Waller* (1981) 37 ALR 481 (HC) the high court of Australia for reasons of forensic efficiency laid down that 3% per year was to be used as the net capitalization rate in all future compensation matters. With this ruling the courts were prohibited from receiving evidence as to interest, inflation and taxation.

[202]Bloembergen '*Schadevergoeding*' 48.

measure. The abstract measure provides a starting point for negotiations.[203]

[2.11.7] The high cost of concretization: The once-and-for-all lump-sum rule prevents a court from waiting for unfolding reality to reveal the future. For this reason courts are compelled to adopt an abstract approach to matters such as mortality, inflation and future salaries. Fuller concretization can be achieved if compensation is paid by instalments. The price of such concretization is the perpetuation of litigation and the expenses of collecting and processing the latest evidence. Notwithstanding access to unfolding reality many issues, such as promotions and the longevity of a deceased breadwinner, remain abstract hypotheses. The passage of time will also increasingly blur the causal relationship between the original injury, or death, and subsequent events.

[2.11.8] The burden of proof:[204] Once liability has been established, the so-called 'merits' of the case, then a plaintiff who seeks to claim damages carries the onus of proving that he has suffered loss.[205] It would, however, produce great injustice if the burden of proof were unduly exacting, after all it is the defendant, not the plaintiff, who is responsible for the wrongful act giving rise to the cause of action and the need to go to court. Conversely innocent defendants need to be protected against unfounded and perhaps malicious actions. The burden of proof that falls on the plaintiff should be such as to justify the invocation by the court of at least an abstract measure of damages.[206] To demand full concretization may well produce injustice. The defendant is then entitled to demand concretization, greater attention to detail, but the burden of proof for such concretization should then fall on his shoulders to demonstrate that the abstract measure is unreasonable. It does arise that it is just not feasible within the constraints of time and money to concretize the damages. The court itself is then justified in adopting an abstract measure rather than refusing to award damages.[207] When collateral benefits are treated as *res inter alios acta* the court is driven by a rule of law to adopt an abstract measure, that is to ignore the realities. Justice would be best served if the defendant were then permitted to prove that the plaintiff will beneficially retain the proceeds of insurance or donation, that is to demand concretization and deduction.

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[203]In *Legal Insurance v Botes* 1963 1 SA 608 (A) 617inf it is said that 'the census statistics... should not be regarded as a starting point, but merely as one of the facts to be considered along with the other facts'. This high-minded appeal to a concretization ignores the realities of settlement mechanics and undermines the credibility of the one and only piece of solid evidence that is generally available concerning remarriage prospects. Remarriage statistics are today very much more refined than when this dictum was handed down (see 1988 *De Rebus* 67 70 631-2).

[204]This procedural topic is conveniently discussed at this point because of its relevance to abstract damages.

[205]See Corbett & Buchanan 3ed 13.

[206]By this I mean that sufficient evidence should be led to permit a provisional, albeit crude, quantification of the damages (*Krugell v Shield Versekeringsmpy* 1982 4 SA 95 (T) 98-9). The ruling in *Van Almelo v Shield Insurance* 1980 2 SA 411 (C) 413D has proved contentious (Corbett & Buchanan 3ed 13). Greater leniency is appropriate to actions for damages for personal injury and death than to other actions (Bloembergen '*Schadevergoeding*' 39; see too the 'egg-shell skull' claimant Neethling Potgieter & Visser 'Deliktereg' 2ed 189-91; Boberg 'Delict' 278-9 283 303-8 445 459 464; McGregor 'Damages' 14ed 105-115; Munkman 'Damages' 4ed 38-9).

[207]*Arendse v Maher* 1936 TPD 162 165; *Sandler v Wholesale Coal Suppliers* 1941 AD 194 198; *Roxa v Mtshayi* 1975 3 SA 761 (A) 769-70. In general a court will, in defendant's favour, make a discount for interest in respect of future loss without any evidence being led (*New India Assurance v Naidoo* 1950 (A) (unreported case 19.5.50) 'no foundation had been laid in evidence... in the absence of any evidence to the contrary that rate [4% py] is a reasonable rate').

[2.11.9] Privileged claimants: Bloembergen[208] states that a plaintiff may elect whether to bring his action on an abstract basis or a concrete basis. He here has in mind claims brought on the basis of cost of repairs,[209] or reduction in value at date of delict,[210] or with allowance for consequential loss.[211] One would think that the availability of such an election is only justified if the defendant has the right to decline to agree to an abstract basis and to invoke a concrete basis, to bring the matter to court and to lead relevant evidence.[212] Damages in excess of the market value of the damaged *res* at date of delict will arise when there is no duty to mitigate by immediate replacement.[213] On the other hand it is conceivable that the damage suffered is less than the abstract measure. Thus Bloembergen[214] gives the example of the person for whom minor damage to the motor vehicle has no disutility notwithstanding that the market value has been reduced. Such a person will clearly be awarded damages for the reduced market value. I have already observed[215] that the collateral-benefit rules create a class of actions where the defendant is by law prevented from proving lesser damage.[216]

[2.12] FORENSIC DYNAMICS

[2.12.1] The most obvious juristic fact: Van der Walt notes the tendency of the Roman jurists to focus upon the most obvious aspect of a situation before the court,[217] that is to say on the external or physical manifestation rather than the abstract idea. Similar juristic psychology prevails today. Thus, for instance, the right to compensation for loss of support is made to hang on the existence of a right to support as distinct from the factual receipt of support.[218] The earnings of an injured man are given undue prominence[219] when his true

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[208]Bloembergen '*Schadevergoeding*' 50-1 71 76 91.

[209]See, for instance, *Erasmus v Davis* 1969 2 SA 1 (A).

[210]*General Accident Insurance v Summers* 1987 3 SA 577 (A) 613B-D.

[211]See, for instance, *Modimogale v Zweni* 1990 4 SA 122 (B).

[212]Van der Walt 'Sommeskadeleer' 196n1.

[213]Van der Walt 'Sommeskadeleer' 99 'Waar die betrokke goedere egter geen markprys het nie, is per definisie geen dekkingskoop moontlik nie, sodat die *lucrum cessans* as sommeskade bepaal moet word'. The criterion of existence of a market price is a poor guide. It is preferable to base the duty to mitigate on what a prudent businessman would have done (*Asamera Oil Corp Ltd v Sea Oil & General Corp* (1978) 89 DLR (3d) 1 (SCC) 20; see too 10-11 'A plaintiff need not take all possible steps to reduce his loss'.

[214]Bloembergen '*Schadevergoeding*' 66-7.

[215]See 35.

[216]If collateral benefits were generally deductible this would greatly increase the litigation risk for a plaintiff that the assessed damages are reduced to a negligible amount or nil.

[217]Van der Walt 'Sommeskadeleer' 172-3 'Die neiging van die Romeinse juris om aan die uiterlik waarneembare aspekte van 'n regsfeit vas te hou, verklaar ook waarom hulle gewoonlik na die regsobjek verwys het in plaas van na die eiendomsreg wat daarop betrekking het'.

[218]Davel 'Skadevergoeding' 44 66-7 notes that Voet 25.3.4 allowed a right of action for a right to support derived from contract. The South African courts would seem to have strayed from the Roman-Dutch principle when they refuse compensation for loss of support provided under a customary union or order of divorce (*Santam v Fondo* 1960 2 SA 467 (A)).

[219]See, for instance, *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) and the emphasis upon a 'contract of employment'.

loss is the utility of his life plan in terms of living expenses.[220] One may speculate that the reason for such juristic distortion is the need for agreement between man and man and a focus upon that aspect of the situation that is most readily communicated to other persons.

[2.12.2] Judicial discretion: I have noted that the utility perceptions of an individual are, as a rule, too elusive, too personalized and too varied to serve on their own as a basis for compensation. Abstraction in the form of rules of assessment is a necessary adjunct to an efficient system of compensation.[221] Such abstraction will always be subject to the consideration that concretization will prevail if this can be achieved efficiently and conclusively.[222] I add the *caveat* that excessive adherence to concretization may lead to as great an injustice[223] as does excessive abstraction.[224] The middle way is always the most difficult to follow as is evident from the following quotations:

> 'In assessing the compensation the trial Judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations'.[225]

Boberg[226] interprets these words to mean that the courts 'are entitled to prefer equity and convenience to the dictates of logic'. On the other hand it has been said that:

> 'While the result of an actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis; whereas the trial Judge's "gut feeling"... as to what is fair and reasonable is nothing more than a blind guess'.[227]

> '"Billikheid" is natuurlik 'n baie vae begrip sonder 'n konstante betekenis maar daar kan in hierdie verband gesê word dat dit 'n versamelbegrip vir die volgende beginsels is: Die hof moet alle relevante omstandighede in ag neem wat op die skadeomvang dui en irrelevante oorwegings, soos besondere simpatie met die eiser, ignoreer; die basiese kompensasie gedagte moet voorop gestel word; die hof moet sy diskresie versigtig en konserwatief uitoefen en eerder te min as te veel toeken; die bedrag wat toegeken moet word, moet nie die verweerder onnodig beswaar ten gunste van die eiser nie. Indien hierdie beginsels toegepas word, kan met 'n groot mate van

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[220]This is a complex topic which is discussed more fully under loss of earning capacity (see 225). Suffice it to note for the moment that income and living expenses are closely correlated (see Page 'Utility Theory' 75; Friedman & Savage 1948 *JPE* 279 298-9). See too balance sheet of a life plan at 234.

[221]See paragraph 2.11.3.

[222]Van der Walt 'Sommeskadeleer' 278.

[223]Concretization will produce injustice when an appeal thereto increases the burden of proof to the point of denying compensation for a loss genuinely suffered (see, for instance, *Broderick Properties (Pty) Ltd v Rood* 1964 2 SA 310 (T) 316A-F).

[224]Van der Walt 'Sommeskadeleer' 94 'vir die eiser begunstigende objektiewe skadebegrip'.

[225]*Legal Insurance v Botes* 1963 1 SA 608 (A) at 614F. See too Voet *Ad Pandectas* 45.1.9.

[226]1981 *BML* 25 27.

[227]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 114D; see too 113A-F.

sekerheid verklaar word dat 'n "billike" benadering gevolg is'.[228]

We may note as well that a court vested with a wide discretion is not thereby relieved of paying consideration to principles and previous decisions:

> 'Like all discretions vested in judges by statute or at common law, it must be exercised judicially, or in a selective... and discriminating manner, not arbitrarily or idiosyncratically, for otherwise the rights of parties to litigation would become dependent on judicial whim'.[229]

> 'Cardozo said, "the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case". Certainty, predictability, reliability, equality, uniformity, convenience: these are the principle advantages to be gained by a legal system from the principle of *stare decisis*'.[230]

However, the process of formulating guidelines is subject to the *caveat* that:

> 'There is a danger that the unfettered discretion will be superseded by the rule of thumb'.[231]

[2.12.3] Adapting the law to changing conditions: Emphasis upon a need for rules or guidelines does not mean that there is not a continuing need for the courts, acting in concert with the legislature, to adapt the law to changing social and economic conditions.[232] As a general rule judicial adaptation will be achieved interstitially,[233] that is by filling in *lacunae* in the law rather than by substituting new rules for old.[234]

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[228]Neethling Potgieter & Visser 'Deliktereg' 2ed 252.

[229]*Cookson v Knowles* [1978] 2 All ER 604 (HL) 606H. See 210. *Financial Mail* 28 September 1992 31.

[230]Hahlo & Kahn 'The South African Legal System' 215. See too *Financial Mail* 2 October 1992 31 concerning a South African judgment that ruled a surety agreement invalid on grounds of public policy: 'The situation now amounts to legal chaos. The casualty is commercial certainty. (Other) judges have managed to find a fair and pragmatic answer by distinguishing the facts before them from those in the case which created the precedent. While this can work well in a particular case, it is not a panacea. Each case will have to be decided on its own set of facts and no generally applicable rule can be formulated'.

[231]*Cloverbay v Bank of Credit & Commerce International* [1991] 1 All ER 894 902.

[232]*Blower v Van Noorden* 1909 TS 890 905 'There comes a time in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important or so radical that they should be left to the legislature'.

[233]Hahlo & Kahn 'The South African Legal System' 306 quoting Mr Justice Oliver Wendell Holmes. See further Hahlo & Kahn 304-6, 311-12; Forsyth 'In Danger for Their Talents' 197-207.

[234] '*Fiat Iustitia*' 290 'The need for judicial enterprise and wisdom to accommodate developments in the social, economic and financial order, where the existing law does not provide for such, is not to be confused with judicial 'legislation' whereby the existing law is discarded or changed in the face of binding precedent or statutory provisions. If the judge is to be free to reform the law as he thinks fit, the overall result might well be worse than the ills they are intended to cure'.

[2.12.4] Juries: When damages are determined by a jury they are 'a question of fact' because the jury and not the judge decides what the damages are to be.[235] The judge decides questions of law:

> 'So long as the award of damages remained the function of the jury precise rules of quantification could not be evolved'.[236]

The jury system was unknown to the classical Roman-Dutch law and was introduced into South Africa by the English. It never found acceptance and was abolished some 60 years ago, 'unwept, unhonoured and unsung'.[237] South African law now has a substantial number of reported judgments concerned with the assessment of quantum by a judge. One might thus expect that fairly sophisticated and detailed rules of assessment had by now evolved and become established. This has not proved to be the case either locally or overseas.[238]

[2.12.5] Sources of normative rules: The major obstacle to the development of detailed rules within the South African sphere has been the repeated emphasis by the judiciary upon retaining a large discretion to award what the court considers right[239] coupled with a philosophy that every problem can be resolved by bringing sufficient evidence. In other words each case is decided on its own facts.[240] There is a view that there are few regular patterns or general principles to be extracted.[241] This 'hands-off' approach of the South African courts, although by no means ideal, has, for various reasons, proved workable:[242]

* An emphasis upon fact generally indicates the application of a differencing methodology.[243] That is to say that the need for, and effect of, differencing is apparent from the evidence before the court.

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[235]McGregor 'Damages' 14ed 1029-30.

[236]Erasmus 1975 *THRHR* 268 274; Munkman 'Damages' 4ed 54.

[237]Hahlo & Kahn (Union of SA) 257; Rood 1990 *De Rebus* 749.

[238]Street 'Damages' (v of preface) 'Hitherto the law of damages has been quite remarkable for the lack of interest shown by jurists in its fundamental rules'; Erasmus 1975 *THRHR* 268 'The Roman-Dutch jurists of the seventeenth and eighteenth centuries displayed a considerable lack of interest'; Reinecke 1988 *De Jure* 221 'Die Suid-Afrikaanse skadeleer verkeer nog in sy kinderskoene'.

[239]*Hulley v Cox* 1923 AD 234 244; *Legal Insurance v Botes* 1963 1 SA 608 (A) 614F 'In assessing the compensation the trial judge has a large discretion to award what under the circumstances he considers right. He may be guided but is certainly not tied down by inexorable actuarial calculations'. See 37.

[240]See footnote 230 for difficulties created by a reliance upon the facts of each case to the exclusion of general rules.

[241]*De Jager v Grunder* 1964 1 SA 446 (A) 451C; Morris 'Technique in Litigation' 2ed 90 'It is a complex concept; it is a fundamental issue of fact'; Corbett & Buchanan (C&B) vol I xxv 'Because of the basis on which damages are computed in fatal injury cases little guidance is given by the quantum of previous awards. For this reason no fatal injury cases are included'.

[242]Such as happened in Australia before the ruling *Todorovic v Waller* (1981) 37 ALR 481 (HC) that a net capitalization rate of 3% per year was to be used in all cases. A little more practical guidance from the courts in South Africa for practitioners responsible for settling damages claims would not be misplaced.

[243]*Erasmus v Davis* 1969 2 SA 1 (A) 5F-G 17D-F; *Union Government v Warneke* 1911 AD 657 665; *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 917. See section 3.4.

* Amongst practitioners concerned with the day-to-day settlement of the vast majority of claims that never reach the courts there is a substantial body of generally accepted rules of assessment.
* There is a heavy reliance by the courts upon actuarial evidence. Actuarial methodology promotes adherence to sound rules of assessment in many areas where the courts have declined to provide guidance.

In addition to these informal sources of judicial rules of assessment there are a number of rules which may truly be said to be rules of the common law.[244] They are not questions of fact.

[2.12.6] Relevance of reported judgments: In general one looks to the decided cases on damages not for authority as to rules of law but for guidance as to the prevailing norms of practitioners and actuaries which are acceptable to the courts. The fact that a particular approach has been adopted by a court in the past does not establish a rule of law but it does establish that a litigant may adduce such a methodology in a subsequent matter without undue fear of rejection. The decided cases identify what methodologies have been accepted in the past, and can be safely used in the future.[245] The English courts speak of 'guidelines' which fill the gap created by inadequate evidence,[246] and have been active in monitoring these 'guidelines'.

[2.13] CONCLUSIONS

This chapter has explored the concept of utility in general, and more particularly techniques for the objectivization thereof for purposes of agreement between man and man. Important objectivizing techniques include direct reference to market prices, reference to relevant surrogate markets, statistical averages and derived expected values, logic and mathematical formulae, and the rules of precedent suitably modified to maintain relevance in changing times.

The assessment of damages for future losses, and past hypothetical losses, is determined by reference to that which is foreseeable by the reasonable man at the time of the assessment as being the normal consequences of the injury or death. Regard will be had to all information available at the time of assessment. Compensation is for the increased chance that an expense will be incurred, or the decreased chance that earnings will be received.

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[244]Inter alia *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) (loss of earnings must be calculated over reduced expectation of life despite fact that but for the injury the victim would have lived a normal lifespan - see 227, 347); *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) (widow who takes up employment after her husband's death is not required to reduce her claim for loss of support by the earnings that she now receives - see 320); *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) (pension benefits paid in terms of contract of employment are to be deducted when assessing damages for loss of earnings - see 183).

[245]Munkman 'Damages' 4ed x 177. 'There is no doctrine of precedent in fixing the quantum of damages'. Munkman has in mind general damages.

[246]*Wright v British Railways Board* [1983] 2 All ER 698 (HL) 705j; *Cookson v Knowles* [1978] 2 All ER 604 (HL) 606-7; *Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL) 915a-c.

CHAPTER 3

DAMAGE AND DAMAGES

Summary: *Perfect restitution is only possible in extremely rare instances. In general the damages awarded by a court are compensation, a fair substitute for what has been lost. When differencing utility regard must be had for the effect of the award for damages on the overall utility after the wrongful act. The assessment of lump-sum damages is assisted by the concept of a patrimonium which includes as assets the present values of future uncertain incomes and outlays. The assessment of damages requires a comparison between the hypothetical state had there been no wrongful act and the actual state having regard to that act.*

[3.1] FORM OF PAYMENT OF DAMAGES

[3.1.1] Rule of procedure: Damages, including those for personal injury and death, are usually awarded by way of a single once-and-for-all lump sum.[1] This lump sum must take full account, not only of losses which antedate the trial or settlement, but also of every foreseeable loss that will occur in the future, however distant and speculative. Once the lump sum has been paid the claimant is precluded from recovering further losses which were not envisaged at the time of the assessment. Conversely the defendant may not recover surplus funds if the claimant dies early, or the losses prove to be less severe than was originally anticipated.

[3.1.2] Advantages of a lump sum: It is not my intention to argue for the abolition of the lump-sum once-and-for-all rule. Many writers have dealt extensively with the subject.[2] Whilst instalment compensation has much to commend it, it certainly is not the juristic panacea that some protagonists would make out.[3] The major pitfall associated with instalment compensation is administrative cost and perpetuation of litigation.[4] The closer we get to the juristic ideal the greater the human effort needed to fulfil the dream. In all

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[1]See, for instance, Boberg 'Delict' 475-94; Neethling Potgieter & Visser 'Deliktereg' 2ed 215-19.

[2]See, for instance, Atiyah 'Accidents Compensation & the Law' 3ed; Hutchison 1985 *THRHR* 24; Pearson Cmnd 7054 1978; Burchell 1981 *BML* 74, 1982 *BML* 107; Davel 'Skadevergoeding' 128, 136-7.

[3]Milburn-Pyle 1980/81 *TASSA* 136 145 notes that perfect knowledge of the rate of inflation does not ease the problem of projecting earnings which do not increase in line with inflation. In the *Bray* agreement (reproduced in Koch 'Damages' 250-2) future instalments are calculated on the basis of 92,5% of the inflation rate. In France use is made of a wage index (Fleming 1977 (26) *AJCL* 51 57). Atiyah 'Accidents Compensation & the Law' 3ed 208 notes the effect on wages of increasing productivity; see too Cooper-Stephenson & Saunders 'Damages in Canada' 157; Anderson 'Actuarial Evidence' 30; Johnson 'Modern World' 223-4.

[4]*Hughes v Santam Insurance* 1988 (W) (unreported 29.9.88 case 20704/86) discusses some of the difficulties and ongoing litigation that can attach to an instalment agreement.

societies economic resources are limited to a greater or lesser extent. Lump-sum once-and-for-all compensation, for all its imperfections, persists because it is administratively efficient.[5] This, however, is not the only reason for the continuing use of lump-sum compensation:

> 'The lump sum has advantages of immediacy, certainty and flexibility, and the evidence tends to show that people prefer it, and if so they should not be accused of imprudence. The importance of certainty becomes evident if one bears in mind the number and variety of misfortunes which can befall nations as well as individuals'.[6]

An inordinately large proportion of academic energy has been directed at the replacement of the once-and-for-all lump-sum rule with a system of compensation by instalments. I have already stated[7] that this thesis takes it be axiomatic that the once-and-for-all lump-sum rule is a convenient, flexible and desirable system that deserves to be retained, albeit, perhaps, in conjunction with instalment procedures.

[3.1.3] Instalment compensation: This is permitted under South African law under limited circumstances.[8] The terms governing the payments are set out by way of an agreement.[9] It is doubtful that a court has the power to order variation of such an agreement should unforeseen circumstances arise. In this sense the once-and-for-all rule continues to apply.[10] In one instance a court has considered itself competent to order compensation by instalments outside the ambit of the statutory provision.[11] The defendant elected not to appeal against this ruling thereby consenting to pay by instalments.[12]

A court may order interim payments once the liability of the defendant has been

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[5]See Milburn-Pyle 1980/81 *TASSA* 136 152-3; Van der Walt 'Sommeskadeleer' 315, 448. 'The principle is that immediate certainty and finality are to be preferred above deferred precision' *Reyneke v Mutual & Federal Insurance* 1992 2 SA 417 (T) 420F.

[6]Pearson Report vol 1 155. See too Luntz 'Damages' 2ed 26; Atiyah 'Accidents Compensation & the Law' 3ed 189.

[7]See paragraph 1.1.

[8]Article 43 of MMF agreement ito Act 93 of 1989 (s8(5) Motor Vehicle Accidents Act 84 of 1986) permits instalment compensation for motor vehicle accident victims but only at the instance of the third-party insurer (*Marine & Trade Insurance v Katz* 1979 4 SA 961 (A) 971H). See too Boberg 'Delict' 486. *Dladla v Minister of Defence* 1988 3 SA 743 (W) discusses the problems created by an apportionment of damages in terms of the Apportionment of Damages Act 34 of 1956.

[9]For examples of agreements see Koch 'Damages' 248-56; *Hartnick v SA Eagle Insurance* 1982 1 PH J10 (C).

[10]'The effect of Mr *Israel*'s argument is that the respondent should be ordered to compensate the appellant for damages which she did not claim in the present action. That argument is contrary to the above quoted common-law rule (once-and-for-all damages). Furthermore the wording of section 8(5)(a) makes it plain that the undertaking is given and can thus be ordered only in respect of such costs as are included in the claim for compensation' *Poo v President Insurance* 1992 4 C&B A3-96 A3-111sup. See too Neethling Potgieter & Visser 'Deliktereg' 2ed 216n140; *MVA Fund v Andreano* 1993 3 SA 227 (T).

[11]*Wade v Santam Insurance* 1985 1 PH J3 (C). Van der Walt maintains that the once-and-for-all rule did not apply in Roman-Dutch times ('Sommeskadeleer' 304ff).

[12]See too *Kleinhans v African Guarantee & Indemnity* 1959 2 SA 619 (E); Rein 1961 *SALJ* 102 103.

established.[13] Such a payment will be restricted to losses accrued to that time. General damages and future losses are excluded.[14] There is no restriction on how many times interim payments may be claimed.[15] It is conceivable that for reasons of convenience a court orders that a regular monthly amount be paid over pending finalisation of the matter.[16]

In certain extremely simple situations something approaching perfect restitution may be achieved. Van der Walt[17] points out that perfect restitution cannot be achieved for past loss.[18] He proposes an instalment system for compensating future loss based upon convenient stops ('ruspunte') where accrued past loss is compensated.[19] Bearing in mind the problems with achieving perfect restitution with past loss[20] it is clear that any system for compensating future losses can never do better than an award for past loss alone.

[3.2] THE AQUILIAN ACTION

Certain aspects of the Aquilian action deserve mention:

[3.2.1] Multiple causes of action: The Roman law allowed compensation by way of numerous special *actiones* each with its own formula and directed at a particular type of damage.[21] Our modern law allows compensation on the basis of two general actions, the Aquilian action and the *actio injuriarum*.[22] In its idealised form the Aquilian action compensates in one once-and-for-all action all forms of financial loss flowing from the injury or death.[23] In practice the notion of a single all-embracing Aquilian action is something of an oversimplification.[24] The *facta probanda* for the dependants' action continues to be viewed as separate and distinct from those for the action for personal injury.[25] For statutory

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[13]Rule 34A of the Uniform Rules of Court (GG4152 27.11.87 R2642); *Nel v Federated Versekeringsmpy* 1991 2 SA 422 (T); *Karpakis v Mutual & Federal Insurance* 1991 3 SA 489 (O). See too article 45 of MMF agreement ito Act 93 of 1989.

[14]*Van Aswegen v General Accident Insurance* 1989 (W) (unreported 16.10.89 case 8420/89).

[15]This gives effect to Van der Walt's concept of a series of actions, each directed at compensating past loss, 'afgeslote skade', alone 'Sommeskadeleer' 291-485.

[16]The *Karpakis* case states *obiter* (at 501D) that the court order may allow for losses in the immediately foreseeable future.

[17]Van der Walt 'Sommeskadeleer' 286.

[18]'There is really only one certainty: the future will prove the award to be either too high or too low' *Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL) 914 c-d. Neethling Potgieter & Visser 'Deliktereg' 2ed 210n96 note that the courts do not have as much difficulty with assessing future loss as Van der Walt would like to suggest.

[19]Van der Walt 'Sommeskadeleer' 291-304.

[20]See paragraph 2.2.3.

[21]Kaser 'Roman Private Law' 149-50; Erasmus 1975 *THRHR* 104 105-6.

[22]*Matthews v Young* 1922 AD 492.

[23]*Green v Coetzer* 1958 2 SA 697 (W).

[24]Van der Walt 'Sommeskadeleer' 151 185-6.

[25]*Evins v Shield Insurance* 1980 2 SA 814 (A). This decision has arrested the development of single right of action for all classes of damage. Loss of support occasioned by death cannot be recovered under the same right of action as damages flowing from a personal injury.

reasons damages for personal injury must be claimed separately from damages for a motor vehicle.[26] The pauperian action provided for liability without fault and still survives independently.[27] The expression 'Aquilian action' is thus best described as a generic term for a variety of separate 'actions' each with its own different *facta probanda*. The common thread is that these actions are all directed at the recovery of patrimonial loss.

[3.2.2] Group actions: Germanic law, by way of contrast to the Roman law, emphasized the interests of the group rather than the individual. Instances of group actions are to be found in South African law,[28] although it is doubtful that these can be traced to any explicitly Germanic origins. Rather they have their origin in the nature of the compensation problem. The most prominent example is the action for damages by an injured breadwinner. When a breadwinner is catastrophically injured his dependants may suffer financial loss by reason of his loss of earnings. The dependants, however, are denied a right of action because they may still look to their breadwinner who himself has a right to claim compensation.[29] The practice of ignoring gratuitous benefits is directed at enabling the victim to reimburse the welldoer and is thus a form of group action[30] where the victim effectively acts on behalf of himself and those who have assisted him. Under the dependants' action the group action exists concurrently with a separate action by the individual.[31]

[3.2.3] Multiple measures of damages: In practice the different actions give rise to different measures for the damages. Damages for breach of contract are subject to a different measure from that applying to delict.[32] Foreseeability is an important factor limiting the defendants' liability under breach of contract and damage to property. With claims for personal injury the 'egg-shell skull' rule applies, that is to say that unforeseeable consequences of the injury will be compensated.[33] With the dependant's action the damages are restricted to loss of support.[34] In general the measure of damages to be used is determined by the purpose of the inquiry.[35] Even when the purpose of the inquiry has been identified one may find that

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[26]Article 40 of MMF agreement ito Act 93 of 1989.

[27]*Lawrence v Kondotel* 1989 1 SA 44 (D); Neethling Potgieter & Visser 'Deliktereg' 2ed 356-9.

[28]See section 11.4.

[29]See *De Vaal v Messing 1938 TPD 34.*

[30]See paragraph 11.4.2.

[31]See Dendy 1990 *SALJ* 155.

[32]*Lillicrap Wassenaar v Pilkington Brothers* 1985 1 SA 475 (A); Boberg 'Delict' 3-16. The law of contract refers to positive *interesse* and negative *interesse*. Reinecke 1976 *TSAR* 26 40 notes that these apparently different measures of the damage reflect two different causes 'Positiewe en negatiewe interesse is egter in werklikheid nie twee verskillende berekeningsmetodes nie, maar dit het betrekking op twee verskillende gebeurtenisse'.

[33]Hart & Honoré 'Causation' 2ed 173 269 271-5; Neethling Potgieter & Visser 'Deliktereg' 2ed 189-91. The prospect of injury to the victim in general must, however, have been foreseen if liability is to arise (*Botes v Van Deventer* 1966 3 SA 182 (A)).

[34]*Legal Insurance v Botes* 1963 1 SA 608 (A) 614E 'as regards maintenance'.

[35]Reinecke 1976 *TSAR* 26 39-42; see 48 below.

more than one measure is used, the one checking the result of the other.[36]

[3.2.4] Punitive damages: There is evidence to suggest that in the classical Roman-Dutch law the measure of damages was different when liability was derived from *dolus* rather than negligence.[37] In modern law damages are no longer punitive.[38] It follows that, once liability is established, the measure of damages is not affected by whether the wrongdoer acted negligently or with *dolus*.

Historically a clear distinction has not always been maintained between the criminal law and civil liability for damages.[39] Under conditions where there was no effective central government to enforce criminal sanctions the old Germanic law bundled together punitive and compensatory considerations. In the modern South African law section 300 of the Criminal Procedure Act[40] empowers a criminal court to order the payment of damages over and above the punishment for the crime. When making such an order the criminal court will take care that it does not prejudice the complainant's right to claim damages in a civil court.[41]

[3.2.5] The dependants' action: The dependants' action for loss of support arising from the wrongful killing of the breadwinner was unknown to the Roman law which subscribed to the ethic that the body of a freeman has no value.[42] The early Germanic customary law allowed a right of action to the sib of the deceased for wrongful killing.[43] The modern dependants' action reflects an *actio utilis*, an extension of the Roman-law action for loss of earnings developed in response to the Germanic ethic that compensation should be awarded for wrongful killing.[44] During its formative stages the action for financial loss consequent to the killing of another was allowed to the heirs of the deceased rather than the dependants.[45]

[3.2.6] Consequential loss: The dependants' action displays the enigmatic feature[46] that a right of action is allowed to persons who have not been physically harmed by the wrongful

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[36]See 54.

[37]*Mlombo v Fourie* 1964 3 SA 350 (T) 357-8.

[38]Erasmus 1975 *THRHR* 268 271; Munkman 'Damages' 4ed 2; Van der Walt 'Sommeskadeleer' 223, 226. *Santam v Byleveldt* 1973 2 SA 146 (A).

[39]See Davel 'Skadevergoeding' 6 14-25. Matthaeus *De Criminibus* 47.4.3-5, for instance, deals with awards for damages in a text dealing with the criminal law.

[40]51 of 1977. cf Matthaeus *De Criminibus* 47.4.3-5.

[41]*S v Tlame* 1982 4 SA 319 (B); *S v Vulesangweni* 1980 3 SA 527 (Tk).

[42]The Roman law did not allow compensation to anyone for the death of a freeman; Davel 'Broodwinner' 11-17.

[43]Davel 'Broodwinner' 55-6; see too paragraph 13.1.4.

[44]Feenstra 1972 *AJ* 227 229.

[45]Feenstra 1972 *Acta Juridica* 227. Reinecke 1976 *TSAR* 26 51-6 argues for a reversion to this approach.

[46]Historically the Aquilian action has had the requirement of *damnum corpore corpori datum*. This requirement has been watered down in the course of time. In *Bester v Commercial Union Versekeringsmpy* 1973 1 SA 769 (A) 781A-B it was said that even a personal apprehension of danger is not essential.

act. In this sense it is an action for pure economic loss.[47] However, if the killing of the breadwinner is viewed as the primary damage then the damage for which compensation is claimed under the dependants' action may be viewed as consequential loss. This is also true of damage flowing from personal injury if the physical injuries are viewed as the primary damage. These preliminary observations reflect the important principle that a clear distinction needs to be drawn between the infringement of a right that gives rise to a cause of action and the factual economic loss that flows from the infringement of that right.[48] Confusion in this regard is aggravated by the use of the same word 'damage' in English to describe both infringement of a legal right ('regskrenking') and the consequential economic loss ('skade').[49]

[3.2.7] Lucrum cessans and damnum emergens: These two expressions occur frequently in the literature on damages. Modern jurists are not entirely in agreement as to their meaning. Some writers maintain that the distinction has ceased to be of any significance.[50] Some perceive *damnum emergens* to be the loss of future accruals to the patrimony of the plaintiff while *lucrum cessans* is viewed as reductions to the patrimony that existed at the time of the delict or breach of contract.[51] Van der Walt identifies *lucrum cessans* with future loss.[52] He does not expressly indicate his own meaning for *damnum emergens* but it may be inferred that he identifies it with past loss.[53] Other writers refer to this same distinction with rather greater clarity.[54] Boberg provides a further variation:[55]

> 'Because a delict may diminish an estate not only by reducing its value but also by preventing its value from increasing, damage is not confined to actual losses or expenses (*damnum emergens*), but includes also the deprivation of a financial benefit that would otherwise have accrued (*lucrum cessans*). To the former category belong medical expenses and the depreciation of damaged property; to the latter a loss of earnings or profits'.

An important point here is that the expression *damnum emergens* refers to both past and future loss, the same being true for *lucrum cessans*. I use these expressions in the same

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[47]Boberg 'Delict' 3-16 58-103.

[48]See 47.

[49]See 48 and 64.

[50]Erasmus 1975 *THRHR* 104 108; Van der Walt 'Sommeskadeleer' 37 (Fischer) 42 (Werner); Reinecke 1976 *TSAR* 26 32n49.

[51]Van der Walt 'Sommeskadeleer' 58-9 (Möller) 75 (Neuner).

[52]Van der Walt 'Sommeskadeleer' 274-5. In this respect he follows Larenz (87-9). His general rejection of the principle of valuation of a chance is evidenced by his refusal to accommodate uncertain future losses under the heading of *lucrum cessans*.

[53]Van der Walt 'Sommeskadeleer' 293-4 'afgeslote skade'.

[54]Neethling Potgieter & Visser 'Deliktereg' 2ed 209; Davel 'Broodwinner' 14 'Ten opsigte van die begrip skade (*damnum*) is 'n onderskeid gemaak tussen reeds gelede en toekomstige skade. Hierdie onderskeid tussen *damnum emergens* en *lucrum cessans* is sedert die Middeleeue bekend'.

[55]Boberg 'Delict' 476. This is the same view taken by Reinecke 1976 *TSAR* 26 29-30.

sense as Boberg. *Damnum emergens* then has the important quality that all uncertainty can be removed by waiting for the 'unfolding reality' whereas with *lucrum cessans* unfolding reality may reduce the degree of uncertainty but can never eliminate it.[56] The difference between *damnum emergens* and *lucrum cessans* is then a distinction between two essentially different types of uncertainty. Just as one may refer to the loss of the prospect of an uncertain profit (*lucrum cessans*) so too one may discuss the prospect of incurring an uncertain expense (*damnum emergens*).[57]

[3.3] DAMAGE - WHAT IS IT?

[3.3.1] 'Damage': The dictionary[58] defines 'damage' to be 'loss or detriment caused by hurt or injury affecting estate, condition or circumstances'. There is general agreement that damage is a concept used extensively by lawyers.[59] Causation is an essential component of this concept.[60] One may discuss causation independently of damage[61] but one may not discuss damage independently of causation.[62] Although damage is a concept used extensively by lawyers this does not mean that one should make the mistake of looking to the substantive law to ascertain what damage is.[63] Damage is an intuitive concept which is shared by lawyer and layman alike.[64] Damage is determined by economic and scientific considerations, not by the law. The law uses the scientific and economic concepts when assessing 'damages'. One should take care not to confuse the methods used to ascertain damage with the legal rules governing the assessment of the related damages.[65]

[3.3.2] Interacting concepts of justice: The foregoing does not mean that the law does not place restraints on what economic and scientific issues may be taken into account when assessing 'damages'. The practice of ignoring collateral benefits such as insurances[66] and non-repayable gratuitous benefits[67] gives rise to damages in excess of the loss suffered in terms of a strictly economic measure. Conversely a policy of currency nominalism gives rise

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[56]*Sigournay v Gillbanks* 1960 2 SA 552 (A) 557-8. Munkman 'Damages' 4ed 71 cites *Moores v CWS Ltd* (*The Times* 5.9.55) for the example of the disabled policeman who was at risk for early retirement long before the accident terminated his employment.

[57]Reinecke 1976 *TSAR* 26.

[58]Oxford English Dictionary.

[59]Visser 1991 *THRHR* 782; Bloembergen '*Schadevergoeding*' 11-13; Reinecke 1976 *TSAR* 26 26-7.

[60]Bloembergen '*Schadevergoeding*' 14.

[61]For instance 'What *causes* the moon to rise'?

[62]See 61 below. Contra Reinecke 1976 *TSAR* 26 41-2. Reinecke advocates a measure of damages which is independent of questions of causation.

[63]*Contra* Visser 1991 *THRHR* 782; Neethling Potgieter & Visser 'Deliktereg' 2ed 203-4.

[64]Bloembergen '*Schadevergoeding*' 11 '*... dat in het dagelijks leven gebruikt word*'. Van der Walt 'Sommeskadeleer' 125n1 refers to a 'voorjuridiese skadebegrip'. See 56 below.

[65]See paragraph 3.3.3.

[66]See, for example, *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 920-1.

[67]*Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A).

to material undercompensation during times of high inflation.[68] The intuitive concept of damage is best viewed as part of natural justice towards which the substantive law endeavours to develop. By reason of changing economic conditions and scientific knowledge the intuitive concept will change from time to time rendering old assessment principles redundant and introducing the need for new procedures. The advent of high rates of inflation has, for example, required a major rethink of attitudes to this phenomenon.[69]

In *Kewana*'s case[70] the court ruled that the protection provided by MVA legislation was not restricted to losses compensated by the Roman-Dutch law. In this instance a child adopted according to customary law was granted a right of action for loss of support caused by the death of the adopting mother. The modern Roman-Dutch law would deny such a child a right of action for loss of support.[71]

[3.3.3] 'Damages': The dictionary[72] defines 'damages' to be 'the value estimated in money of something lost or withheld; the sum claimed or awarded in compensation for loss or injury sustained'. Damages is a strictly legal issue limited to what the law will allow. The fiction of *restitutio in integrum* makes out that there is a perfect correlation between damage in the economic sense, and the damages awarded. In practice the courts are no more able to effect perfect restitution than they are able to bring the dead back to life or restore a severed limb. This is so regardless of what procedural regime is adopted, be it compensation by instalments or by lump sum.[73] It follows that **damages are not restitution, they are compensation,**[74] a monetary substitute for what has been lost determined according to a set of legally determined rules and conventions.[75] Otherwise stated the damages awarded is the price for which society expects the victim to exchange what would have been for what now is. An inquiry into damages is really an inquiry into the loss of utility suffered by the plaintiff regarding his patrimony and his person.

[3.3.4] Damage as a legal concept: Damage is a legal concept in the sense that lawyers are commonly called upon to make decisions about it. The word 'damage' is, however, ambiguous and can, depending on usage, encompass a number of different aspects of the damage-creating event:

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[68] *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A).

[69] See, for instance, Spandau 1975 *SALJ* 31; *Mallett v McMonagle* [1969] 2 All ER 178 (HL) 190.

[70] *Kewana v Santam Insurance Co Ltd* 1993 (Tk) (unreported 28.02.93 case 112/88).

[71] See footnote 123.

[72] Oxford English Dictionary.

[73] See paragraph 2.2.3.

[74] See Munkman 'Damages' 4ed 1-2; Bloembergen '*Schadevergoeding*' 48 114; Van der Walt 'Sommeskadeleer' 65 157 280 285; Neethling Potgieter & Visser 'Deliktereg' 2ed 197; Erasmus 1975 *THRHR* 104 106 'Historically, the sum of money of the judgment is probably to be explained as the price of redemption from liability, that is, the monetary composition offered to the victim in order to save the wrongdoer from the harshness of personal execution'.

[75] Neethling Potgieter & Visser 'Deliktereg' 2ed 197 'geld dien dus as ekwivalent vir die skade'; see too 227.

[3.3.4.1] Damnum corpore corpori datum: First of all there is damage in the physical sense, the violent damaging of one tangible by another, the early Aquilian requirement of *damnum corpore corpori datum*.

[3.3.4.2] Infringement of a right: Secondly there is damage in the abstract legal sense of infringement of a right, 'regskrenking'.[76] This form of damage is essential if there is to be a right of action in law. If the physical damaging of a person's body or goods also constitutes the infringement of a legal right then it is said that it has been done wrongfully. Usually the legal right infringed is that of the person injured or the owner of the goods. The right of action granted to dependants for the wrongful killing of the breadwinner derives from an infringement of the right to support enjoyed by the dependants.[77] With pure economic loss there is no physical damage, only the infringement of an intangible legal right. As a general rule for every right there is a corresponding duty. It follows that infringement of a legal right will may usually be restated as a failure to observe a duty. In this thesis I do not propose to explore the relationship between rights and duties.

[3.3.4.3] Reduced economic resources: Thirdly there is damage in the economic sense. The infringement of the abstract legal right brings with it a diminution in the economic resources that the victim would in the normal course of events have been able to command in order to fulfil a life plan comprising not only the necessities of life but also the chosen quality of life. The infringement of a right does not necessarily give rise to damage in the economic sense.

For an action for damages to succeed the claimant must not only prove damage in the sense of an infringement of a legal right, but he must also prove damage in the economic sense of a reduction in the utility of his life plan.[78]

[3.3.5] Roman law: The classical Roman law did not award compensation for consequential loss. The focus was on the physical object which had been damaged. Whatever perceptions of damage were harboured by the Romans the damages awarded were based on the market value of the object damaged. It is conceivable that even partial damage was visited with the same award as was total destruction.[79] The Romans were more concerned with composition, buying off public humiliation or physical punishment for the wrongdoer, than

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[76]Neethling Potgieter & Visser 'Deliktereg' 2ed 204 observe the distinction between 'regskrenking' and damage in the economic sense.

[77]See 344.

[78]Reinecke 1976 *TSAR* 26 34. See 56 below.

[79]Kaser 'Roman Private Law' 214; Lee 'Roman Law' 4ed 395-6; Leage 'Roman Private Law' 3ed 410-11. The last two sources conclude on grounds of common sense that the Roman law could not possibly have been so harsh as to award the full value of the *res* when a residual value remained. If one bears in mind that damages during this period were viewed as composition rather than compensation the conclusions drawn by Lee and Leage are by no means necessary. The modern practice to ignore insurance payments may well be viewed with equal disbelief by a commentator 1000 years from now.

restitution for the plaintiff.[80] The concept of differencing has greatly extended the range of damage that will be compensated.[81]

[3.3.6] Comprehensive compensation: The ideal measure of damages is that which leads to the most comprehensive possible compensation.[82] This means that when assessing damages regard should be had to all financial gains and losses flowing from the injury or death. The word 'comprehensive' implies universality.

The concept of the most comprehensive possible compensation does not mean the making to the claimant of as large an award of damages as can be motivated within the evidential framework. In relation to collateral benefits it can mean quite the reverse due to the making of substantial deductions. With damage to property, and with breach of contract, where limitation of damages is common,[83] the concept may, however, imply an extended range of liability due to the wider range of damage viewed as worthy of being compensated.

Van der Walt[84] states as regards the expression 'die volledigs moontlike vergoeding':

> 'Onder hierdie uitdrukking verstaan ek die volgende: hoewel volledige skadevergoeding teoreties denkbaar is, kan dit prakties nooit deurgevoer word nie; dit kan toegeskryf word èn aan die grense wat ingevolge die bewys- en prosesreg gestel is aan die praktiese doenlike, èn aan die feit dat volledige skadevergoeding in gepaste gevalle op grond van juridiese waardeoordele onwenslik mag wees'.

Van der Walt was particularly concerned in his thesis with the restraints placed on comprehensive compensation by the lump-sum once-and-for-all rule. Bloembergen[85] is somewhat more sanguine as regards this principle and notably emphasises the monetary aspect:

> *'Het is niet voor betwisting vatbaar, dat ten onzent als hoofdregel geldt, dat alle schade vergoed moet worden of zoals men doorgaans zegt, dat de schade volledig vergoed moet worden. Of nog weer iets anders gezegd: behoudens uitzonderingen is de - doorgaans in geld uitgedrukte - schade even groot als de - doorgaans in geld uitgedrukte - schadevergoeding'.*

Elsewhere in his thesis Bloembergen[86] points out in relation to this concept that to ignore collateral benefits is to objectivize the damages and ignore the true state of affairs. That is

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[80]Erasmus 1975 *THRHR* 104 105-9.

[81]See section 3.4. Reinecke 1976 *TSAR* 26 38 considers that the range has been extended too far.

[82]'Die volledigs moontlike vergoeding' Van der Walt 'Sommeskadeleer' 8 43 46 93 108 115 125-6 189-90 205 227 229 242 250 279 301 304; Bloembergen '*Schadevergoeding*' 117 120 121 317 337.

[83]See paragraph 3.3.7.

[84]Van der Walt 'Sommeskadeleer' 8.

[85]Bloembergen '*Schadevergoeding*' 117.

[86]Bloembergen '*Schadevergoeding*' 52.

to say the concept of the most comprehensive possible compensation requires the deduction of insurances not subject to subrogation,[87] and the deduction of gratuitous benefits not subject to reimbursement.[88] One might debate whether these benefits are part and parcel of damage suffered or whether they are to be viewed as part of the compensation along with the award for damages. In other words are they to be deducted when assessing the damage or later when calculating the damages? This point is not entirely academic. Thus, for instance, when there is to be an apportionment of damages[89] is the deduction for insurance benefits to be made before or after apportionment?[90]

Erasmus [91] states that 'A purely objective standard of assessment does not satisfy a sophisticated sense of justice'. By the words 'purely objective standard' he means disregard for the special circumstances of the case. However, excessive demand by the courts for particularity, that is wholesale concretization, can increase the burden of proof to the point that legitimate damages are denied.[92]

[3.3.7] The 'eggshell skull' rule: Liability for damages for personal injury and death arises provided the bodily harm in a general sense was foreseeable immediately prior to the event causing the harm.[93] The foresight of bodily harm encompasses a wide variety of different types of injury, including those leading to death and mental shock short of actual physical contact.[94] Events subsequent to the injury may reveal unexpected forms of loss outside what might be considered normal. With damages for breach of contract and damage to physical property liability is limited to foreseeable harm, that is to say to damage which is considered normal having regard to the nature of the wrongful act.[95] With damages for personal injury the so-called 'eggshell-skull' rule applies whereby the victim may recover for damage which, prior to the event causing the injury, would have been viewed by the reasonable man as unusual and unexpected.[96]

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[87]See 183.

[88]See 190.

[89]In terms of the Apportionment of Damages Act 34 of 1956.

[90]The treatment of benefits payable in terms of the Workmen's Compensation Act 30 of 1941 provides an example of this problem (see Koch 1987 *THRHR* 475-80; 1990 *De Rebus* 343-6).

[91]Erasmus 1975 *THRHR* 104 107.

[92]See, for example *Broderick Properties v Rood* 1964 2 SA 310 (T) 316.

[93]The prospect of injury to the victim in general must, however, have been foreseen if liability is to arise (*Botes v Van Deventer* 1966 3 SA 182 (A)). See too Neethling Potgieter & Visser 'Deliktereg' 2ed 186; *Smit v Abrahams* 1992 3 SA 158 (C) 163-4 and discussion thereof by Neethling & Potgieter 1993 *THRHR* 157.

[94]*Bester v Commercial Union Versekeringsmpy* 1973 1 SA 769 (A).

[95]Foresight in the sense of a reasonable possibility, or probability, will be based on the knowledge imputable immediately prior to the wrongful act to the reasonable man, coupled with the special knowledge of the wrongdoer (Neethling Potgieter & Visser 'Deliktereg' 2ed 186n156).

[96]Hart & Honoré 'Causation' 2ed 173 269 271-5; Neethling Potgieter & Visser 'Deliktereg' 2ed 189-91. Van der Merwe & Olivier 'Die onregmatige daad' 212 are against the 'eggshell skull' rule. See *Smit v Abrahams* 1992 3 SA 158 (C).

Hayward v Protea Versekeringsmpy[97] provides a lone example of foreseeability being invoked to limit damages for personal injury. Damages had been claimed for loss of inheritance prospects for the victim due to the reaction of his father to the injuries. The court declined to apply the 'eggshell-skull' reasoning.[98] Foreseeability was not the sole reason for denying compensation for this head of damage.

The above considerations would suggest that foreseeability is not relevant to the assessment of damages for personal injury and death to the same extent that it limits the damages payable for breach of contract, or damage to goods. This is largely true of that which was foreseeable immediately prior to the act or omission which caused the harm. **However, once the full extent and nature of the injuries, or death, are known then the question of the foreseeability by the court of subsequent financial losses having regard to the injury, or death, becomes an all-important consideration.**[99]

[3.3.8] Modern juristic perceptions: The modern intuitive perception of damage is that of a reduction to the value of the physical object damaged.[100] The felt need for a damaged object to which to point is evident in the practice whereby personal injury claims are described as actions for 'loss of earning capacity' or 'loss of earnings'.[101] When a breadwinner is killed the focus falls on the lost right to support.[102] Van der Walt has noted the Roman propensity to hark upon the most obvious aspect of the legal event,[103] that is to say the external manifestation or physical object, rather than the abstract idea or concept. In this regard jurists have not changed very much since Roman times.[104] Financial advantages which serve to reduce the loss suffered are generally perceived not as part of the damage but rather as a separate class of 'compensating advantages', factors which serve to compensate the claimant for his damage.[105] Factors which aggravate the loss suffered will in certain cases be ignored on the grounds of 'causally unrelated', 'too remote', 'unforeseeable'.[106]

Neethling Potgieter & Visser define 'damage' as follows:

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[97]1985 3 C&B 588 (C) 601.

[98]Neethling Potgieter & Visser 'Deliktereg' 2ed 191 suggest that one may allow an exception to the 'eggshell-skull' rule when the damage is wildly unforeseeable.

[99]See 20.

[100]Van der Walt 'Sommeskadeleer' 284; Bloembergen '*Schadevergoeding*' 9-10; Neethling Potgieter Visser 'Deliktereg' 2ed 210-11. This seems to be the essence of the causally independent measure of damage described by Reinecke 1976 *TSAR* 26 as 'konkrete skade'.

[101]See 218.

[102]*General Accident Insurance v Summers* 1987 3 SA 577 (A) 612D.

[103]See paragraph 2.12.1.

[104]Boberg's unnecessary attempts to rationalize an award for loss of the financial benefits of marriage in the 'earning capacity' mould rather emphasises this point (see Boberg 'Delict' 576-7).

[105]Bloembergen '*Schadevergoeding*' 315. See too 179 below.

[106]Neethling Potgieter Visser 'Deliktereg' 2ed 159-95. The perception of causation as a juristic discretion rather than a factual inquiry sometimes gives rise to questionable rulings (see the examples discussed at 207 below).

> 'Skade is die nadelige inwerking op enige vermoëns- of persoonlikheidsbelang wat die reg as beskermingswaardig ag. Anders gestel, dui skade op die afname in die nuttigheid of kwaliteit van 'n aangetaste vermoëns- of persoonlikheidsbelang wat dien tot bevrediging van die betrokke persoon se regserkende behoeftes'.[107]

This definition does not confine damage to financial loss but includes harm to personality interests. This conforms with the observation that there is substantial overlap between patrimonial loss and general damages for pain and suffering and loss of the amenities of life.[108] Damage to earning capacity is a prime example of a loss displaying this duality.[109] Neethling has proposed that earning capacity be included under a fifth class of legal objects.[110]

The definition of damage quoted above does not expressly address the issue of whether damage can exist independently of the law. Reinecke[111] and Visser[112] have gone so far as to suggest that the rule against compensation for illegal earnings arises because the victim has suffered no damage. Van der Walt[113] does not agree with this view. Nor, it seems, do Neethling Potgieter & Visser[114] who cite a number of examples of extra-legal damage.[115] That having been said, the definition of damage quoted above conforms with the views expressed in this thesis.

[3.3.9] Reinecke's formulation: There is an ongoing conflict, a lack of congruence, between the economic measure of damage which requires the deduction of collateral benefits, and the legal measure of damages which often excludes collateral benefits from the calculation. Reinecke has endeavoured to resolve this conflict by abandoning an explicit process of differencing in favour of an intuitive measure of damages that he calls 'concrete damage'.[116] His preference for a concrete approach to damages is also motivated by his perception that a measure of damages based on causal considerations would cast too wide the liability of the defendant.[117] Reinecke unfortunately provides no examples of what he understands by the expression 'concrete damage'. One may tentatively surmise that he has

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[107]Neethling Potgieter & Visser 'Deliktereg' 2ed 198.

[108]See 204 and 215.

[109]Loss of earning capacity may be claimed either as part of the general damages or as a separate item (see *Southern Assurance v Bailey* 1984 1 SA 98 (A).

[110]Neethling 1990 *THRHR* 101 104-5.

[111]1976 *TSAR* 26 32-3.

[112]Visser 1991 *THRHR* 782.

[113]Van der Walt 'Sommeskadeleer' 15n24.

[114]Neethling Potgieter & Visser 'Deliktereg' 2ed 198-9.

[115]See 56.

[116]Reinecke 1976 *TSAR* 26-56; 1988 *De Jure* 221-38.

[117]Reinecke 1976 *TSAR* 26 38 'Die doel en funksie van die vergelykingmaatstaf was bloot om die deure kousaal gesien wyd oop te gooi'.

in mind concretization in the sense of reliance on the evidence,[118] that is to say the damage that is *prima facie* self-evident from the evidence before the court, without the need for abstract analysis, especially regard for an abstract '*universum*'.

In *De Vos v SA Eagle Insurance*[119] the untimely killing of the deceased before he could pay the first premium on a life insurance policy prevented the payment of the death benefits the policy. The refusal by the appellate division to award compensation is clearly correct because the present value of the future premiums payable was at least equal to the actuarial value of the *spes* of a death benefit at a later date.[120] The appellate division based its finding on the simple observation that had there been no death there would have been no insurance payment. The perception by the claimant that damage had in this instance been suffered would seem to be the sort of concrete damage according to first impressions, the absence of abstract analysis that Reinecke has in mind.

Another example of 'concrete damage' as perceived by Reinecke would, it seems, be the costs of repairing a damaged motor vehicle. The cost of repairs is, however, but one way of assessing the damages. The preferable view seems to be that one should have regard to more than one measure, the one being used as a check on the conclusions drawn from the other:

> 'The measures employed to estimate the money value of anything (including the damage flowing from a breach of contract) are not to be confounded with the value which it is sought to estimate; and the true value may only be found after employing more measures than one - in themselves all legitimate, but none of them necessarily conclusive by itself - and checking one result with another'.[121]

In so far as Reinecke's fears as regards causation and the associated extended liability are concerned, one cannot regard this as a problem if one takes the view that ideal compensation is comprehensive compensation.[122] Where the damage extends over long periods of time the continuing incidence of supervening causal events will increasingly blur the causal connection.[123] There would also be the discounts for interest and uncertainty. The 'eggshell skull' rule[124] applies in matters concerning personal injury and death, and also, so it seems, to certain other categories.[125] This has not led to obviously excessive awards.

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[118]See paragraph 2.11.7.

[119]1985 3 SA 447 (A). See discussion of this case by Neethling Potgieter & Visser 'Deliktereg' 2ed 199n10.

[120]See paragraph 13.13.6.

[121]From *Duke of Portland v Wood's Trustee* 1926 SC 640 651 cited with approval in *Erasmus v Davis* 1969 2 SA 1 (A) 5E.

[122]See paragraph 3.3.6.

[123]See, for example, 348.

[124]See 51.

[125]1993 *THRHR* 157 161 'Eerstens is van belang dat die *talem qualem*-reël nie (meer) tot persoonlike beserings ('eierskedels') beperk word nie maar ook tot ander gevalle (soos die finansiële onvermoëndheid van die eiser *in casu*) uitgebrei kan word' (discussing *Smit v Abrahams* 1992 3 SA 158 (C)).

Reinecke's fears as regards unlimited causal extension are, it seems, not a matter of major concern. One does, however, sympathise with Reinecke's groping for a fundamental concept of damage which would explain the substantive law, rather than contradict it. However, some doubt may be expressed that legal rules of assessment are founded on a single unambiguous concept of damages.

[3.3.10] Van der Walt's formulation: Van der Walt summarizes his concept of damage as follows:[126]

> 'Na my mening moet daar vir doeleindes van die vergelyking aangeknoop word by die eiser se individuele vermoënsbestanddele en hulle nuttigheid vir die bevrediging van sy erkende behoeftes volgens sy eie planmatige vermoënsgestalting. Die vergelyking moet onderneem word deur die pasgenoemde nuttigheid van die te ondersoeke vermoënsbestanddeel soos dit voor die plaasvind van die gewraakte gebeurtenis was... Wat *was* and wat *is* word dus met mekaar vergelyk'.

Van der Walt defines damage in terms of the utility ('nuttigheid') of a life plan ('planmatige vermoënsgestalting') to which the plaintiff's fellow men in the legal sense ('regsgenote') assign a monetary value.[127] The concept of 'the utility of a life plan' is a wide one. In the absence of objectivization by reference to the values of our 'fellow men' in the sense of a general norm,[128] one strays into the realm of non-patrimonial loss. Even with non-patrimonial loss a general norm exists.[129]

A point that deserves some attention is Van der Walt's statement that 'What was and what is are compared'[130] If this statement had regard to an ongoing series of events over a period of time it would have been phrased 'What *would have been* and *what has happened* are compared'. Van der Walt's statement displays no sense of the effect of the passage of time on the value of the loss. His phraseology probably reflects no more than a focus on past loss rather than continuing future loss.

The once-and-for-all award of lump-sum damages serves to top up the victim's lump-sum utility to what it would have been.[131] Van der Walt proposes a system of topping up at intervals rather than once-and-for-all. Both procedures involve the reduction of very personal utilities to objectively determined money.[132]

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[126]Van der Walt 'Sommeskadeleer' 284.

[127]Van der Walt 'Sommeskadeleer' 281.

[128]Voet '*Ad Pandectas*' 45.1.9; Erasmus 1975 *THRHR* 104 115 269n111. This may be either legal or commercial (see 22 above).

[129]See 204.

[130]'Wat *was* en wat *is* word dus met mekaar vergelyk' (see quotation).

[131]Bloembergen '*Schadevergoeding*' 115 uses the concept of a bucket of patrimonial items. Van der Walt 'Sommeskadeleer' 145n6 describes this as 'sy plastiese beeld van "*een emmer vol vermogenbestanddelen*"'.

[132]See 22.

[3.3.11] Loss and damage: The measure of damage is affected by the cause of the damage and the purpose of the inquiry.[133] Consider the arsonist who sets fire to a house, but while the house is burning there is a massive earthquake that causes the house to collapse.[134] If the arsonist is to be sued for damages he has no liability because had there been no fire the house would in any event have been destroyed and had no value. However, the insurer of the house would be liable if the policy covered loss by fire or earthquake. From the point of view of the owner of the house a loss has been suffered. This loss is only described as 'damage' if there is an implication that someone is culpably liable to make good the loss.[135] In other words not all financial losses are damage.[136] It follows that when defining 'damage' regard must be had to the allocation of responsibility for the loss. That suggests a legal rather than an economic measure of damage. On the other hand consideration of the financial losses suffered by the victim and caused by the wrongdoer may suggest that the legal measure of damage has been cast too narrowly. It is important for the ongoing growth of law and practice that 'damage' be defined independently of limitations placed on damages by the prevailing substantive law.[137] The very expression 'limitation of damages' implies a concept of damage that extends beyond what will be compensated by the substantive law.[138] The doctrine of *restitutio in integrum* can create the misleading impression that damage and damages are co-extensive.[139]

[3.3.12] Actionable damage: The existence of damage is an essential component of Aquilian liability. It has been said that the fact of physical injury or death alone does not found an Aquilian action.[140] However, an injured child who has suffered no past patrimonial loss will be granted a right of action.[141] What 'damage' is it then that gives rise to the right of action? Suffice it say that there is some confusion as to precisely what constitutes 'damage' sufficient to found a right of action. Notwithstanding one clear ruling to the contrary,[142] the prevailing practice is to accept evidence of the value of the chance of

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[133]See footnote 32.

[134]This is the example used by Reinecke 1976 *TSAR* 26 39.

[135]In some instances the victim will have been partly or wholly responsible for causing his own loss.

[136]Reinecke 1976 *TSAR* 26 36 ''n duidelike onderskeid tussen skade en beskadiging gehandhaaf moet word' and at 34 'Vermoënsvermindering as gevolg van "gebeurtenisse" wat seker gaan plaasvind soos slytasie, dood, verbruik van lewensmiddele, ensovoorts, is dus terminologies nie skade nie'. The words 'seker gaan plaasvind' are not entirely correct because some unavoidable loss-causing events such as illness cannot be said to be certain. Reinecke here would seem to have in mind rather events which are considered normal in a contingent sense (see 20 above).

[137]See footnote 64.

[138]See too 47.

[139]See paragraph 3.3.3.

[140]Erasmus & Gauntlett *LAWSA* vol 7 39. Contra *Coetzee v SAR&H* 1934 CPD 221 226; *Wieser v Pearson* 109 DLR 3d 63 70.

[141]*Southern Insurance v Bailey* 1984 1 SA 98 (A).

[142]*Coetzee v SAR&H* 1933 CPD 565 576. This judgment has been the subject of much criticism and has caused serious confusion as regards pure prospective loss (see Corbett & Buchanan 3ed 11; Neethling Potgieter & Visser 'Deliktereg' 2ed 214n125; Boberg 'Delict' 488; Buchanan 1960 *SALJ* 187; Boberg 1964 *SALJ* 147; Buchanan 1960 *SALJ* 143-4). It is notable that the first *Coetzee* decision was not followed in its sequel *Coetzee v SAR&H* 1934 CPD 221 226 (Watermeyer J was a party to both hearings).

financial loss as proof of damage sufficient to found a right of action.[143] The fact that actual financial loss will not materialize for many years, if at all, is irrelevant providing such loss can be established as a *certa spes*.[144] Perhaps by reason of the action for general damages for pain and suffering and loss of amenities of life, an action for pure future loss is granted by way of convenience? A preferable view is to accept as damage adequate to found the Aquilian action a *certa spes* of future patrimonial loss.[145] Undoubtedly the loss of a chance in the past founds the Aquilian action.[146] There is authority for the proposition that under the dependants' action a *certa spes* of future loss is sufficient.[147] The one possible objection to allowing a *certa spes* of loss to found the Aquilian action is the problem of prescription. With actions involving physical injury to property or person it is difficult to imagine problems. With pure financial loss it would seem a sufficient safeguard that prescription should not run until the victim becomes aware of his prospective loss.[148]

[3.4] DIFFERENCING METHODOLOGIES

[3.4.1] Intuitive notions of differencing:[149] We all have an intuitive notion of damage as a deprivation or diminution occasioned by the wrongful act. Implicit to the notion of damage is a comparison between an existing state of affairs and a hypothetical state of affairs, that which would have been had there been no wrongful act. Because of the hypothetical nature of loss it is always attended by a greater or lesser degree of uncertainty. Very minute degrees of uncertainty will for practical purposes be ignored.

[3.4.2] 'Differenztheorie': For juristic purposes intuitive notions need to be reduced to communicable procedures.[150] The *Differenztheorie* of Mommsen reflects an early attempt at defining a generalised approach to damages assessments. Mommsen defined damage to

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[143]An injured child suffers no immediate demonstrable financial loss in the sense of debt incurred or money paid out. It is the parents who suffer the immediate losses by reason of their duty of support. It is unthinkable that a child should be denied a right of action until the age when, but for the injury, the child would have entered employment (see, for instance, *Southern Insurance v Bailey* 1984 1 SA 98 (A); see too *Jacobs v Cape Town Municipality* 1935 CPD 474 479 concerning the death of a child). Reinecke 1976 *TSAR* 26 30 ''n persoon inderdaad regtens skade ly sodra 'n bepaalde vermoënsverwagting in sy geheel of ten dele verydel word. Andersins sou dit tog onmoontlik wees om te verklaar waarom die persoon onmiddelik skadevergoeding kan haal'.

[144]See paragraph 4.1.8.

[145]This seems to be the dominant view of writers on the subject: Boberg 'Delict' 488-9; Neethling Potgieter & Visser 'Deliktereg' 2ed 208inf; Reinecke 1976 *TSAR* 26 30. In *Coetzee v SAR&H* 1933 CPD 565 576 the court required a demonstrable past loss to found the Aquilian action. In *Coetzee v SAR&H* 1934 CPD 221 226 the physical injury to the plaintiff was taken to be the basis for the Aquilian action (Watermeyer J was a party to both decisions).

[146]*Chaplin v Hicks* [1911-13] All ER 224 (CA); *Trichardt v Van der Linde* 1916 TPD 148.

[147]*Jacobs v Cape Town Municipality* 1935 CPD 474 479 'Patrimonial loss includes prospective gains'. Seemingly contra *Van Vuuren v Sam* 1972 2 SA 633 (A) 635D-E 'Om in haar aksie te kon slaag, moes die appellante bewys dat die oorledene tot haar onderhoud bygedra het en dat hy dit gedoen het en sou voortgegaan het om dit te doen omdat hy regtens daartoe verplig was' (this may have been said with the particular circumstances of the case in mind). English and Australian law is quite clear about allowing an action based on a *certa spes* of future loss (Luntz 'Damages' 2ed 406).

[148]Boberg 'Delict' 488-9.

[149]See 217 for a further discussion of this central issue.

[150]cf Van der Walt 'Sommeskadeleer' 213, 216.

be:

> 'The difference between the value of a person's patrimony at a given point in time and the value which this patrimony would, at the same point in time, have had in the absence of the intervention of the particular event causing damage... Today there is a general acceptance of the rule that the time of trial, that is the time when the calculation of *interesse* is done, is the basis of the law'.[151]

This statement of principle, a product of German scholasticism, has found its way into South African law through *Union Government v Warneke*[152]. As a starting point to an inquiry into damages Mommsen's formulation can be useful provided one bears in mind its limitations which include:

[3.4.2.1] Loss of use: Mommsen's formulation takes no account of losses occasioned by temporary loss of use. Suppose I am deprived of my sailing yacht for a period of one year. *Differenztheorie* leads to the conclusion that my patrimonium is not reduced because at all relevant times I remain owner of an undamaged yacht. In practice I have been deprived of the utility of unfettered usage as and when I please, a utility to which one may reasonably ascribe a value for compensation purposes. Is such loss patrimonial or non-patrimonial? The problem of loss of use will be discussed in more detail at a later stage.[153]

[3.4.2.2] Wasted expenses: Serious injury to a bride shortly before her wedding may lead to substantial wasted expenses if the wedding is then called off. The victim is deprived of the utility of those expenses, the benefit for which they were incurred. If the injuries now ensure that the wedding will not take place at another date, Mommsen's formulation suggests a nil loss whereas considerations of lost utility suggest a substantial loss. Damages for wasted expenses have been awarded by South African courts.[154]

[3.4.2.3] Past loss of earnings: Mommsen's formulation fails to disclose a loss under circumstances where the courts would make an award for past loss. For example a breadwinner may be severely injured and reduced to supporting himself and his family on 30% of the income which he would have had in the uninjured condition. Assume that before the injury he was a man of limited means with a nil estate. By the time the matter goes to trial some 3 years later he still has a nil estate and the hypothetical estate

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[151]Author's translation of '*Die Differenz zwischen dem Betrage des Vermögens einer Person, wie derselbe in einem gegebenen Zeitpunkte ist, und dem Betrage, welchen dieses vermögen ohne die Daswischenkumst eines bestimmten beschädigenden Ereignisses in dem zur Frage stehenden Zeitpunkte haben würde ... Heutzutage gilt jedoch allgemein die Regel, das die Zeit des Urtheils... die Zeit, zu welcher die Berechnung des Interesse vorgenommen wird, zu Grunde zu legen ist*' (Mommsen '*Beitrage zum Obligationenrecht*' Vol 2 at 3).

[152]*Union Government v Warneke* 1911 AD 657 665 where reference is made to Grueber 'The Roman Law of Damage to Property' (1886). See too Van der Walt 1980 *THRHR* 1 3-4; Reinecke 1976 *TSAR* 26 27.

[153]See 163.

[154]*Trichardt v Van der Linde* 1916 TPD 148 (horse racing); *Monumental Art Co v Kenston Pharmacy (Pty) Ltd* 1976 2 SA 111 (C) (rent). See too Reinecke 1976 *TSAR* 26 37sup.

but for the injury is also assessed at nil. According to Mommsen he has suffered no loss. The courts, on the other hand, would recognize the past loss of earnings and award 70% of the full notional earnings during the pre-trial period.

[3.4.2.4] Single universal action for damages: Mommsen' formulation assumes a single universal damages action for all losses of whatever nature flowing from the wrongful act. Despite what was said in *Green v Coetzer*[155] modern proceduralism perpetuates separate actions for different heads of patrimonial loss.[156]

[3.4.2.5] Considerations of equity: Mommsen's formulation takes no account of equitable considerations excluding the deduction of collateral benefits. *Differenztheorie* dictates that all financial advantages flowing from the injury should be deducted when assessing damages, whereas utility theory is more finely balanced and provides a middle path between *Differenztheorie* and the prevailing forensic practices.[157]

[3.4.2.6] Utility of damages award: Mommsen's formulation fails to draw attention to the effect of the damages award itself on the plaintiff's overall utility[158].

[3.4.3] Classical differencing: The '*Differenztheorie*' of Mommsen has had a major impact on the methodology used by the courts for assessing lump-sum damages: Damages are these days generally calculated by having regard to all that the plaintiff would have brought into his patrimony, and disbursed therefrom, in the absence of the injury; a like calculation is then performed having regard to the plaintiff's injured condition.[159] The cash flows are capitalized and the resulting difference awarded as compensation. One might write this as a formula:

Formula A
damages = value before less **value after**

[3.4.4] Utilitarian differencing: The classical formulation of the assessment process tends to create the impression that damages are the result of the difference between two numerical sums. This can lead to some incorrect conclusions and for this reason it is preferable to

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[155]*Green v Coetzer* 1958 2 SA 697 (W).

[156]*Evins v Shield Insurance* 1980 2 SA 814 (A) ruled that the actions for loss of support and loss of earning capacity are separate and distinct by reason of different *facta probanda*; see Boberg 'Delict' 515-16. The action for bodily injury has become separated from the action for damage to physical goods by reason of the third party insurance legislation (article 40 of MMF agreement ito Act 93 of 1989) which covers only personal injury and death (see too Van der Walt '*Sommeskadeleer*' 374-5; Boberg 'Delict' 504-5). General damages for non-patrimonial loss arising from an injury are not Aquilian (*Government of RSA v Ngubane* 1972 2 SA 601 (A) 606) but are generally claimed in the same action as damages for financial loss (*Casely v Minister of Defence* 1973 1 SA 630 (A) 642). See 43 above.

[157]See 35 and 180.

[158]See formula B at 59.

[159]See *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 917E; Neethling Potgieter & Visser 'Deliktereg' 2ed 210-11.

recast the formula as follows:

Formula B
utility after combined with **utility of award = utility before**

This formulation emphasises that the award of damages is an event that forms part of the plaintiff's reconstituted life plan. It is a disturbing event as was the original injury. Whereas formula A treats the award as something separate and distinct from the plaintiff's life plan, formula B reflects the reality, namely that the award becomes part and parcel of the plaintiff's new life plan. Formula B implies that the court apprised of the matter may have regard to the interaction of the award with plaintiff's life plan and the revised utility that results. Formula A, it deserves note, will generally provide the court with a first cut at the problem, some guidance as to the order of magnitude of the award to be made. In many instances this will be sufficient to finalize the award.

Examples of the interaction of the award with the claimant's lifestyle include:

[3.4.4.1] Saved finance charges: One of the more obvious effects of a substantial damages award to an injured victim is that he will be able to pay off the bond on his house and pay cash when he buys a car, thereby being spared finance charges.

[3.4.4.2] Business opportunities: For an otherwise impecunious labourer the compensation money may open up lucrative career opportunities such as the purchase of a taxi or a shop. On a labourer's wage it would never have been possible to raise sufficient funds. The injuries may make it necessary to hire a driver.

[3.4.4.3] Psychological advantages: The award will bring with it the dignity that goes with being of independent means and free from the need to work. During the period preceding the payment of compensation the victim may well have suffered the humiliation of being cast upon the charity of others. The award will thus provide not only financial advantages but also psychological advantages.[160]

[3.4.4.4] Remarriage prospects: Formula A suggests that in an action for damages for loss of support the widow's remarriage prospects should be determined without regard for the fact of the award. Formula B suggests that remarriage prospects should be assessed having regard to the award.[161]

[3.4.4.5] Loss of insurability: The contracts of many employees provide for substantial insurance cover against death and disability, at no cost to the employee. The premiums which the employer pays to provide this cover are a measure of the value of this fringe benefit. Formula A suggests that when calculating damages the loss of earnings should

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[160] See 60 for further discussion.

[161] *Burns v NEG Insurance* 1988 3 SA 355 (C) 364H-I 'a substantial dowry will undoubtedly add to her charms'.

include the value of the premiums which had been a benefit of employment. Formula B highlights that if substantial lump-sum compensation has been paid the claimant will have substantial assets and his need for insurance cover for death or disability will largely fall away.[162]

[3.4.4.6] Loss of support during the 'lost years': When a breadwinner is injured and suffers a reduction to his expectation of life his dependants suffer a prospective loss of support in respect of the 'lost years'. The award of a substantial lump sum to the claimant gives rise to a prospect of a substantial inheritance for the dependants in years to come.[163] Except in the case of the most severe reduction to the breadwinner's life expectancy the enhanced *spes* of inheritance will partly or wholly offset the reduced *spes* of support.[164]

[3.4.4.7] Disability grants: State disability and welfare grants are subject to a means test. The payment of compensation will usually disqualify the recipient from further payments. It follows that such benefits should be deducted from past loss only, and not from future loss.[165]

[3.4.5] Causation implies differencing: A finding as to causation involves an hypothesis of what would have happened had the causal act not occurred. Every causal event takes place against the background of numerous pre-existing conditions and **an expected normal or usual sequence of events.**[166] The causal event interferes with the normal course of events to produce a different sequence of events.[167] It follows that the concept of causation is inseparable from the notion of a hypothetical sequence **but for the causal act** and an actual sequence **having regard to the causal act.** Hypothesis in the sense of an expected normal, or usual, course of events[168] is an essential component of causation.[169] This is

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[162]See section 12.10.

[163]Reduction to the expectation of life means that the chance of early death is greatly increased (see 81). The prudent victim will not seek to consume all interest and capital over his reduced life expectancy (see 102).

[164]Even without reduction to life expectancy there is a substantial value for the chance that the wife or children will inherit a part of the award for damages (see 92).

[165]See 199.

[166]Hart & Honoré 'Causation' 2ed 29 'The notion that a cause is essentially something which interferes with or intervenes in the course of events which would normally take place, is central to the common-sense concept of cause'. See 20 above.

[167]Hart & Honoré 'Causation' 33-41 466 'A cause is a condition which *departs* from the ordinary or regular course of events'.

[168]Under the *actio de pauperie* liability arises if the animal has acted *contra naturam sui generis* (*Lawrence v Kondotel* 1989 1 SA 44 (D) 50-2). In other words liability arises if the animal has acted contrary to what the reasonable man would foresee as the normal course of events in the presence of such an animal.

[169]A *conditio sine qua non* implies the hypothesis 'What if the condition were removed?'. In general a cause in law must be a *conditio sine qua non* (*Minister of Police v Skosana* 1977 1 SA 31 (A) 35C-D; Hart & Honoré 'Causation' 2ed 466). Van der Walt 'Sommeskadeleer' 587 refers to 'hipotetiese kousaliteit', 'causation by omission' (see Hart & Honoré 'Causation' 2ed 30n3&4). Prediction, in the contingent sense, ie according to a set of probabilistic laws, implies a theory, an hypothesis about the real world (Zellner 'Econometrics' 38-9).

particularly clear when one is dealing with 'hypothetical causation',[170] that is to say causation by omission.[171]

The assessment of damages, because it derives from consideration of what damage has been 'caused' by the wrongful act, requires a similar comparison between what has happened, and will happen, **having regard to the wrongful act** and what would have happened **had there been no wrongful act.**[172] The notion of an expected normal, or usual, course of events is vital to the assessment of damages for future losses, and for past hypothetical losses.

[3.5] PATRIMONIUM - WHAT IS IT?

[3.5.1] Patrimonial and non-patrimonial: The courts distinguish between 'patrimonial' and 'non-patrimonial' loss. Patrimonial losses are those which can be proved with direct evidence of the loss of money or the loss of goods upon which society places a monetary value. Non-patrimonial losses, such as pain and suffering and loss of the amenities of life,[173] are those to which society outside of the courtroom does not ascribe a demonstrable commercial value:

> 'What is a reasonable sum for general damages for personal injuries cannot be measured and tested as reasonable price can be, by the experience of the market-place'.[174]

Notwithstanding the sterile validity of this observation there is a general practice by the courts to determine the reasonableness of an award for general damages by having regard to previous awards.[175] The assessment of damages for loss of earning capacity is not without difficulties and the courts will in this instance too often not have the benefit of the experience of the market place.[176] The distinction between a judicially determined 'market-place' and a commercially determined one is, however, fundamental to the distinction between patrimonial and non-patrimonial loss. Van der Walt[177] notes that it is possible that money provides a full equivalent for patrimonial loss, but never so for non-patrimonial loss. The point made here is that although there are some instances of patrimonial loss where perfect restitution can be achieved by the payment of money, there are no such instances when compensating for pain and suffering and loss of the amenities of life. What is more important is that there are numerous instances of so-called patrimonial loss for which the

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[170]See, for instance, Van der Walt 'Sommeskadeleer' 587 ('hipotetiese kousaliteit').

[171]Hart & Honoré 'Causation' 2ed 30n3&4.

[172]See 60.

[173]*Administrator-General SWA v Kriel* 1988 3 SA 275 (A) 288.

[174]*Mutual & Federal Insurance v Swanepoel* 1988 2 SA 1 (A) 10A.

[175]See 204.

[176]See, for instance, *Union National Insurance v Coetzee* 1970 1 SA 295 (A) 301-2; *Roxa v Mtshayi* 1975 3 SA 761 (A) 769-70. Even past loss of earnings can be a matter of extreme subjectivity, eg *Chaplin v Hicks* [1911-13] All ER 224 (CA); *Sandler v Wholesale Coal Suppliers* 1941 AD 194 198.

[177]'Geld as skadevergoeding kan dus moontlik vir skade 'n egte ekwivalent bied, maar nie vir nie-vermoënskade nie' Van der Walt 'Sommeskadeleer' 185-6.

payment of money cannot achieve perfect restitution. That is to say the distinction between patrimonial and non-patrimonial is not always as clear as one might like to think. For instance:

[3.5.1.1] Earning capacity: Earning capacity is obviously patrimonial in the sense that evidence of earnings may be available. Nonetheless an award of general damages, particularly for children, may include allowance for earning capacity[178] and possible future medical costs.[179] The anomalous dual nature of earning capacity has led Neethling to suggest that there should be recognition of a third class of personal immaterial rights.[180]

[3.5.1.2] Organ transplants: Modern medicine permits the transplanting of human organs and these days one finds market values being placed upon such organs.[181] One suspects that trading of this nature would generally be viewed by the courts as *contra bonos mores* and thus to be disregarded. The main point, however, is that in certain instances a court may have regard to the prices in such a market when determining the level of an award for general damages for an injury such as the loss of a kidney.

[3.5.1.3] Services of wife and mother: The services rendered by a wife and mother in running the family home may be lost by reason of her death or injury. Such services do not have a commercial value[182] except in the rather inadequate sense of the cost of hiring a substitute housekeeper. It has been recognised that a wife's services in the home are something better and worth more than that of a hired housekeeper.[183]

[3.5.1.4] Overlapping heads of damage: A substantial award for patrimonial loss may affect the award for general damages in the sense that goods and services which can notionally be purchased with the funds will substantially relieve the pain and suffering or loss of amenities.[184]

[3.5.2] Assets less liabilities: In classical Roman times 'patrimonium' meant assets without

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[178]*MacDonald v Parity Insurance* 1967 1 C&B 748 (D); *Assur v Protea Assurance* 1981 3 C&B 196 (C); *Dyssel v Shield Insurance* 1982 3 SA 1084 (C); *Roxa v Mtshayi* 1975 3 SA 761 (A); *Mashini v Senator Insurance* 1979 3 C&B 82 (W).

[179]*Celliers v SAR&H* 1961 1 C&B 160 (T); *Mashao v President Insurance* 1993 (T) (unreported 1.6.93 case 8370/92).

[180]Neethling 1987 *THRHR* 316.

[181]Time Magazine March 13 1989 88; February 20 1989 16; June 17 1991.

[182]'The work performed by women and men in households is not assigned any economic value; yet this work equals, in monetary terms, a huge proportion of the total amount of wages and salaries paid by all employers in SA'. *Finance Week* October 23-29, 1986 272.

[183]*Regan v Williamson* [1976] 1 WLR 305; McGregor 'Damages' 14ed 897; *Wood v Santam Insurance* 1976 2 PH J52 (C).

[184]*Light v Conroy* 1948 1 C&B 444 (T) 445; *Celliers v SAR&H* 1961 1 C&B 160 (T) 164; *Niblock-Stuart v Protea Assurance* 1973 2 C&B 323 (C) 327; *Administrator-General SWA v Kriel* 1988 3 SA 275 (A).

deduction for liabilities.[185] In later Roman law the law of bankruptcy changed to confine the creditors to the assets for satisfaction of their debts and the modern concept of 'insolvent' came into being. The perception of 'patrimonium' changed to assets less liabilities. From a utility point of view liabilities have disutility.[186] This disutility offsets the utility of the assets. The perception of the patrimonium with regard to bankruptcy is essentially the same concept as the estate which a person leaves on death.

[3.5.3] Inappropriate analysis: The spectacular success of scientific method in the natural sciences, particularly physics, led to attempts during the nineteenth century to apply the same scientific techniques to the human sciences. Bentham[187] set out to develop utility theory as the science of social behaviour. Others sought to establish a science of law based on rights and duties.[188] One thus finds the commercial problem of the value of a patrimonium restated in the terminology of legal science: 'In later Roman law property came to mean the *universitas* of the plaintiff's rights and duties'.[189] Pursuant to this type of analysis it has been said that the value of a chance does not form part of a person's patrimonium.[190] The classification by rights and duties may be appropriate for purely legal problems but is inappropriate for problems requiring the determination of economic value,[191] that is to say for the assessment of damages. Thus for example:

> ***[3.5.3.1] Value of a chance***: In *Chaplin v Hicks*[192] the plaintiff suffered a past loss, the loss of the chance of an acting contract. No legally enforceable rights or duties came into existence other than the right to sue for damages.
>
> ***[3.5.3.2] Injury to a child***: When a child is injured the notional future earnings would have been derived from an hypothetical contract which does not exist in legal terms, and never will.[193]

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[185]Van der Walt 'Sommeskadeleer' 166-73.

[186]The disutility of debt varies widely between different persons. There are some who will avoid debt and pay cash for everything. There are others for whom the possession of assets is everything and debt a minor irritation to be largely ignored.

[187]Jeremy Bentham 'An Introduction to the Principles of Morals and Legislation' 1823.

[188]eg Grueber 'The Roman Law of Damage to Property' (Oxford 1886) 269 'Accordingly, it is the whole loss which the plaintiff has sustained in his property (the word "property" being taken in the sense of a universitas or complex of legal relations, rights as well as duties), or, in other words, the *difference* of plaintiff's property, as it was after the act of damage and as it would have been if the act had not been committed, this so-called *interesse*... which has become the object of the Aquilian action in the course of time'.

[189]*Union Government v Warneke* 1911 AD 657 665.

[190]Erasmus 1980 *De Rebus* 389 391 '... the intended beneficiary (under a will) has nothing but an unstable *spes* to inherit which cannot be regarded as forming part of his patrimony'. The same, of course, may be said of the future earnings of a young child.

[191]Van der Walt 'Sommeskadeleer' 181 184-5 241-5; Bloembergen '*Schadevergoeding*' 26-7.

[192][1911-13] All ER 224 (CA).

[193]Reinecke 1976 *TSAR* 26 29 '... 'n persoon... wat verhoed word om inkomste te verkry wat hy deur die beoefening van sy beroep sou gekry het, op vergoeding geregtig is, ten spyte daarvan dat geen bestaande vermoënsreg uitgewis of aangetas is'.

The above examples have regard to 'legal rights and duties' in a very narrow sense. There are also 'legal rights and duties' in the more general sense, such as the right to physical integrity, and the right to work. It is the infringement of these general rights that gives rise to a child's right to claim damages for personal injury. The inadequacy, for assessing damages, of a classification by rights and duties does not mean that such a classification is irrelevant to the law of damages. The fact that there is a right, or duty, attaching to a financial prospect affects the likelihood that the prospect will materialise.[194] Much, for example, has been made of the so-called 'contract of employment' as a basis for assessing damages for loss of earning capacity.[195] Close analysis of this 'contract' reveals that it includes a substantial contingent element subject to the employer's discretion, notably salary increases, bonuses, promotions, overtime work and leave pay.[196] The fact that a victim had a 'contract of employment' at the time of his injury will lead to a much larger award for damages than if the victim were a child or unemployed adult.

[3.5.4] Patrimonium in the broadest sense: For purposes of the assessment of damages the concept of 'patrimonium' needs to be extended beyond not only legal rights and duties but also beyond the familiar notion of the deceased and/or bankrupt estate.[197] This leads one to question whether the word 'patrimonium' should be used at all in relation to damages? Today the word 'estate' tends to be used to designate 'patrimonium' in the narrow sense (deceased estate, insolvent estate). Regardless of its inadequacies the word 'patrimonium' is generally included in discussions of damages. For this reason in the context of damages I use the word 'patrimonium' in its broadest sense to include the present value of all future indeterminate gains and losses,[198] whether these be protected or enforced by the law or not. It is helpful to represent the concept using the schematics of a balance sheet as in table 2:

Apart from house, car and bond the values in this 'balance sheet of life', this 'extended patrimonium', reflect the present capitalized values, the present utility, or disutility, for the prospect of the future benefit or outlay. This schematic helps to put earnings in perspective in relation to the other items which impact upon the utility of a life plan. Thus if earnings are removed from the balance sheet by reason of the injury of the breadwinner, taxation will be removed on the liability side, but nothing else. The loss suffered is earnings less taxation.

[3.5.5] Capitalization: Table 2 above contemplates the use of 'capitalized values'. 'Capitalization' means to establish a present here-and-now lump-sum equivalent for one or more future payments, usually periodical.[199] This process involves not only adding up the

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[194]Dit 'beteken nie dat die bestaan van so 'n reg vir die skadeleer irrelevant is nie. Die bestaan van 'n reg op die verwagte vermoënstoename sal naamlik lig werp op die mate van waarskynlikheid waarmee daardie vermoënstoename te verwag was' Van der Walt 'Sommeskadeleer' 285. See too Reinecke 1976 *TSAR* 26 31.

[195]*Dippenaar v Shield Insurance* 1979 2 SA 904 (A).

[196]See 195.

[197]Reinecke 1976 *TSAR* 26 29-31 argues that financial expectations ('vermoënsverwagtinge') do form part of a patrimony.

[198]For damages assessment at a time after the injury or death it is convenient to have regard to both past and future gains and losses, certain and uncertain.

[199]Funk & Wagnalls Standard Dictionary.

TABLE 2 - THE BALANCE SHEET OF A LIFE PLAN

ASSETS	R1000	LIABILITIES	R1000
Gross earnings	250	Support self	90
Inheritance	5	wife	90
Services of wife	100	children	135
House	110	Taxation	55
Car	12	Bond on house	20
		Net patrimonium	**87**
Totals	477		477

individual past and future amounts **and applying discounts for interest, but also applying discounts for risk and uncertainty**, that is to say for mortality and other 'general contingencies'.[200] It is important to note that **the capitalization process is not complete until the deduction for general contingencies has been established and applied.**

Damages are usually assessed several years after the event causing the damage. For this reason the concept of 'capitalized value' needs to include the value of past losses accumulated to date of assessment. Ideally this 'capitalization' of past losses would include allowance for past delay by the adding on of interest,[201] just as a discount for interest is applied when capitalizing future items.[202] Past hypothetical items are as much subject to a discount for risk as are future items.[203] The percentage deduction for past risk and uncertainty is usually less than for the future, due to the benefit of hindsight.[204]

The formulation of classical differencing by Mommsen[205] contemplates a mere adding up of items ('betrage'), as with the bill at a restaurant. This is something of an oversimplication because it ignores the discounting considerations which arise in the more complex problems associated with the evaluation of a life plan. The process of capitalization is a process of valuation comparable to that of putting a price on a block of flats[206] or a share-market investment. The capitalized value of a life plan is the present utility of the expected income and outgo associated with the ups and downs of life.

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[200]See 149.

[201]See 163.

[202]See 125.

[203]See 72.

[204]See discussion of supervening events at 20.

[205]See 58.

[206]See 215.

Popular usage of the word 'capitalize' often contemplates the use of compound interest only, without any thought for a discount for risk. For actuaries the word 'capitalize' implies the application of a discount for interest, **and also a discount for mortality in the sense of the risk or early death**, but without allowance for other general contingencies.

[3.5.6] Ever changing life plans: The patrimonium in its narrow as well as its extended sense is always changing.[207] As the breadwinner grows older the value of prospective earnings will decline as too will his capitalized liability for support. The bond will be reduced, the car replaced and the family home increase in value. If there is a divorce then the burden of support will change: a man may lose the services of his wife and half the house but still find himself burdened with the cost of providing his ex-wife with support.

[3.5.7] Present and future patrimonies: Reinecke[208] distinguishes between a here-and-now and a future patrimony.[209] His here-and-now patrimony corresponds with the concept of an insolvent or deceased estate. His future patrimony contemplates prospective gains and losses of a contingent nature. Reinecke expressly refrains from consideration of past losses[210] and the associated problems of the chance of a past gain, as in *Chaplin v Hicks*[211], and the value of past loss of buying power, as was awarded in the *Everson* case.[212]

The schematics of the balance sheet of a life plan illustrated under table 2 above bring Reinecke's divided patrimony together as a single undivided whole. For assessing damages some time after injury or death one needs to include in the patrimonium past income and outgo adjusted for inflation, or interest, to give present value at date of trial.[213] Inevitably the needs of a particular analysis will lead to divisions of the patrimonium in different ways.

[3.5.8] Past and future loss: If damage is viewed as the lump-sum present value at the date of the delict of the chance of all subsequent losses then all damage is suffered once-and-for-all immediately the wrongful act is committed. In this sense there is no such thing as future loss.[214] The practice of damages assessment has, however, focused on the individual monthly, or weekly, items of loss of earnings or support which form the basis of the present-value calculation, the so-called 'continuing losses'. The assessment is usually done several

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[207]Reinecke 1976 *TSAR* 26 29: 'Die vermoë, soos 'n lewende organisme, deur 'n voortdurende proses van groei en afsterwing gekenmerk word. Bestaande vermoënsbestanddele raak vir die persoon verlore, terwyl nuwe bestanddele deurlopend bygevoeg word'; Van der Walt 'Sommeskadeleer' 291.

[208]Reinecke 1976 *TSAR* 26 28.

[209]'die huidige en die toekomstige vermoë'.

[210]Reinecke 1976 *TSAR* 26 26.

[211][1911-13] ALL ER 224 (CA).

[212]*Everson v Allianz Insurance* 1989 2 SA 173 (C). Although there is a very real loss of utility suffered the legal measure of damages does not extend that far (*SA Eagle Insurance v Hartley* 1990 4 SA 833 (A)).

[213]In this sense the upward adjustment of past loss for loss of buying power is of the same nature as discounting future items to present value. See paragraph 10.4.4.

[214]See, for instance, the reasoning of the court in *Ruby v Marsh* 1975 ALR 385 (HC).

years after the wrongful act with the result that some of the 'continuing losses' lie in the past and others in the future relative to the date at which the assessment if made. The distinction between past and future loss is a procedural matter reflecting the manner in which the calculations are done.[215] The same is true of a separate award for general damages. In the end a single undivided lump sum is awarded representing the agglomerated present utility of all the various considerations that have gone into its making.

[3.6] UTILITARIAN NATURE OF DAMAGES

[3.6.1] The shadow of future events: I will demonstrate[216] that when damage is compensated by the award of a lump sum which has been discounted for risk and for interest the lump sum cannot be used by consuming interest and capital to reproduce what has been lost by way of future instalments of earnings or support. **The lump sum is thus something separate and distinct from the series of future payments that it represents.**[217] It has equivalent value but only in the sense of being the shadow cast by the future upon the present. One cannot use a two-dimensional shadow to reproduce the three dimensional object that casts the shadow. With future financial losses the discounting process irreversibly eliminates the dimension of time.

A shadow is always larger than the object that casts the shadow. Not so with damages. The shadow of future financial events behaves like perspective in a picture. The further away is the three-dimensional object the smaller is its representation in the two-dimensional picture. Thus remoteness in time leads to a shrinkage in value, the discount for interest which I will discuss further below under the heading of 'The time value of money'.[218] The lump sum awarded as damages for future loss is best viewed as a single dimension monetary representation, a present-value shadow, of a complex series of future financial events from which the dimensions of time and risk have been eliminated by the discounting process.

[3.6.2] General damages: The lump-sum present value of future loss of earnings or support has an enigmatic quality. For this reason the rules of court[219] specify that the amount claimed in this regard should be stated separately from special damages. The value of the chance of loss of earnings may be claimed either explicitly or as part of general damages.[220] This suggests that the lump-sum present value of lost earnings is of the same nature as general damages, a loss of utility rather than a loss of money. If the observation is true for loss of earnings then it is also true for the lump-sum present value of loss of support, and for future necessary expenses, *damnum emergens*. Because damages for loss of earnings, future expenses, and loss of support are measured according to the standard of

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[215]See r18(10) of the Uniform rules of court.

[216]See paragraphs 5.3.1 and 6.1.1.

[217]See too paragraph 12.1.4.

[218]See chapter 8.

[219]See r18(10) of the Uniform Rules of Court.

[220]Neethling Potgieter & Visser 'Deliktereg' 2ed 210 'Algemene skade sluit dus vermoënskade en nie-vermoënskade in'. See paragraph 11.8.3.

what is expected[221] they have a patrimonial quality. This is not to say, however, that the related lump-sum present values provide the means for perfect restitution.

[3.6.3] Capital and income: The concept of a capital asset separate and distinct from the income which the asset produces is a well established feature of tax law.[222] The same distinction is appropriate between a lump-sum award for damages and the complex pattern of past and future contingent losses which that lump sum represents. For reasons which are by no means clear the appellate division has in recent times resisted giving recognition to this distinction in the field of damages.[223] There are older dicta from the appellate division which point to a more realistic view of the nature of a lump-sum award.[224] The modern trend nonetheless raises the interesting question as to whether the doctrine of consuming interest and capital to effect perfect restitution is a question of law or a question of fact. If it is a question of law then how does one reconcile the technique of value of a chance[225] with a doctrine that every future item of loss can be reproduced by dutifully investing the lump-sum award at interest? It has been commented that modern practice is trying to sit on two stools at the same time.[226]

[3.6.4] The meaning of 'value': Closely linked with the distinction between capital and income is the ambiguity inherent to the word 'value'. In one sense 'value means market value',[227] that is to say the expected cost of replacement. In another sense 'value' means merely the sum total of a series of debits.[228] With damages for personal injury or death the word value takes on a different connotation still, dictated by the fact that present value is determined according to an objectivized standard recognized by our fellow men. Whereas for goods the value of the goods implies the cost of replacing those goods, for personal injury and death such replacement is generally not possible. The word 'value' in this latter context implies no more than a fair price measured according to an objective standard. Although for personal injury and death there is an adding up of items as envisaged by Mommsen, restitution, the notion of a perfect one-to-one match between loss and damages, is prevented by the necessary discounts for risk.

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[221]'Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie' *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 150A-C; *Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D.

[222]*CIR v African Oxygen* 1963 1 SA 681 (A); *Taeuber & Corssen v SIR* 1975 3 SA 649 (A).

[223]See, for instance, *General Accident Insurance v Summers* 1987 3 SA 577 (A) 614; *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 838-9.

[224]'Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie' *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 150A-C; *Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D.

[225]See 71.

[226]Neethling Potgieter & Visser 'Deliktereg' 2ed 233n247 'Dit wil lyk of die praktyk op twee stoele probeer sit en verdienvermoë beide as 'n afsonderlike bate en as toekomstige skade sien'.

[227]*Monumental Art v Kenston Pharmacy* 1976 2 SA 111 (C) 118G.

[228]See quotation at 58 above. The word '*betrage*' implies an adding up process such as one finds with the bill at a hotel or a restaurant.

[3.6.5] The pricing formula: When a court determines the value of lost support or earnings by discounting over the period of the loss, it is effectively using a formula by which to determine the price to be paid for what has been lost. The courts might prefer to describe their pricing activity in terms of a victim who in consuming interest and capital replaces what has been lost.[229] Such descriptions of the process do not alter the fact that **lump-sum compensation for uncertain continuing loss is necessarily contingent and compensatory, as distinct from deterministic and restitutory**. 'Compensation' implies a payment in substitution for what has been lost, to make amends, to give as recompense, to weigh against.[230] It does not mean to replace or restore. The lump-sum paid as compensation is essentially a fair price for forgiveness. Thus the formula or method used to calculate this price may be described as a 'pricing formula'. A change in the lump-sum value of an ongoing loss by reason of an event that supervenes between date of delict and date of trial[231] may be described, using the above terminology, as a 'Bayesian revision of the pricing formula'.

The thesis of these last paragraphs is explored at a technical level in the chapters that now follow.

[3.7] CONCLUSIONS

Damage is the adverse effect on a patrimonial or personality interest regardless of whether or not the law regards it as worthy of protection. Otherwise stated damage is the reduction in the utility or quality of the affected patrimonial or personality interest that serve to satisfy the relevant person' needs. In practice lawyers will only have regard to those aspects of damage for which compensation may be claimed. In other words damages are circumscribed by the law, but not damage.

Damages are the monetary compensation, the price that the law allows, for the diminution in the utility of the plaintiff's extended patrimony, including quality of life. By payment of this price as a lump sum the wrongdoer is released from all further obligation to the person who suffers loss. In its ideal form the award of damages would be equal in value to the damage that has been suffered.

Due to the limitations of our human condition restitution for uncertain past and future loss can only be achieved in the abstract sense of topping up the present utility of the victim's life plan, having regard to the wrongful act, to the same level as that of the notional life plan that has been lost. The compensation payable for this purpose should have regard to the effect of the award itself on the overall utility of the person's life plan.

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[229] *Gillbanks v Sigournay* 1959 2 SA 11 (N) 15A; *General Accident Insurance v Summers* 1987 3 SA 577 (A) 614; *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 838-9.

[230] The Shorter Oxford English Dictionary. See too paragraph 3.3.3.

[231] See section 2.8.

CHAPTER 4

VALUE OF A CHANCE

Summary: *This chapter introduces the technique whereby the present value of an uncertain hypothetical event is calculated by taking the value of that event as a certainty and then reducing it by a percentage to allow for the contingency of non-occurrence. The technique is applicable equally to past and future losses. The technique is distinguished from proof in a civil court on the balance of probabilities. The determination of the percentage chance may have regard to historical statistics but will more often be based on subjective value judgments. The analysis of chances according to subjective considerations has been a major field of study for analysts of utility.*

[4.1] DEFINITION

[4.1.1] Value of a chance: This is the technique of damages assessment for uncertain loss whereby the court awards a proportion of what the loss would have been if it were certain to occur:

> 'A related aspect of the technique of assessing damages is this one; it is recognised as proper in an appropriate case, to have regard to relevant events which may occur, or relevant conditions which may arise in the future. Even when it cannot be said to have been proved, on a preponderance of probability, that they will occur or arise, justice may require that what is called a contingency allowance be made for a possibility of that kind. If, for example, there is acceptable evidence that there is a 30 per cent chance that an injury to a leg will lead to an amputation, that possibility is not ignored because 30 per cent is less than 50 per cent and there is therefore no proved preponderance of probability that there will be an amputation. *The contingency is allowed for by including in the damages a figure representing a percentage of that which would have been included if amputation had been a certainty'*.[1]

A notable feature of this technique is that if the amputation becomes necessary the victim will, despite diligent investment of the compensation money, have only 30% of the full cost of the surgery. It is not possible to reconcile this consideration with popular concepts of *restitutio in integrum*. It nonetheless remains a valid technique for dealing with uncertain loss, which highlights the true nature of an award of damages for uncertain loss. The value

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[1] *Burger v UNSBIC* 1975 4 SA 72 (W) 75D-G (emphasis supplied); approved in *Blyth v Van den Heever* 1980 1 SA 191 (A) 225-6; see too *Van Oudtshoorn v Northern Assurance* 1963 2 SA 642 (A) 650-1; *Kwele v Rondalia Assurance* 1976 4 SA 149 (W) 152-3; *Goedhals v Graaff-Reinet Municipality* 1955 3 SA 482 (C); *Wilson v Birt* 1963 2 SA 508 (D) 517.

calculated using the technique of value of a chance is a fair price to pay now for the uncertain prospect of surgery in the future. In other words **it is the present utility of the loss as a component of the victim's life plan.** It is the essence of compensation as distinct from restitution. Restitution is achieved but only in the abstract sense of topping up the present value of the utility of the victim's life plan. The technique of value of a chance permeates every aspect of uncertain loss, including a continuing loss of earnings and a continuing loss of support. I will in coming chapters examine the manifestations of this phenomenon in the context of continuing loss.

[4.1.2] Intuitive downward adjustment: In many instances the court does not explicitly identify a percentage chance of occurrence. Instead the value of the chance is assessed directly as a sum of money already reduced to the required extent.[2] This would seem to be the manner in which the technique was known to the Roman-Dutch authorities. Grotius, for instance, records that present and certain losses are worth more than future and uncertain losses.[3] Buchanan records that the principle has for some time been implicit to the assessment of general damages.[4] Reinecke aptly describes this process of discounting for risk and uncertainty as follows:

> 'Hoe hoër die waarskynlikheid van vervulling wat bewys word, hoe groter sal die waarde van die vermoënsverwagting natuurlik wees totdat dit uiteindelik die waarde van die vermoënsreg waarop dit gerig is, ewenaar'.[5]

[4.1.3] Past loss: The technique of value of a chance applies not only to future losses but also to uncertain past losses. The *locus classicus* is *Chaplin v Hicks*:[6] The plaintiff had been one of 50 finalists from an original 600 entrants for a competition. From these 50 finalists were to be selected twelve winners each of whom was to receive a three-year acting engagement, the top four at £5 per week, the next four at £4 per week and the remaining four at £3 per week. Due to the wrongful act of the defendant the plaintiff was denied the opportunity to present herself for the decisive personal interview. The jury made an award of £102. Had the plaintiff succeeded to a £4 per week contract she would have received about £600 in total. She was thus awarded some 17% of the value of the contract as a certainty. The award was confirmed on appeal, it being argued that what the plaintiff had lost was not the prize itself but the opportunity, or chance, to win the prize. This matter, it deserves note, was concerned with *past* loss of earnings.

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[2] *Blyth v Van den Heever* 1980 1 SA 191 (A) 226C; see too *Van Oudtshoorn v Northern Assurance* 1963 2 SA 642 (A) 650-1 (chance of epilepsy).

[3] Grotius *Inleiding* 3.32.16 '... onzeecker ende toekomend goed niet soo veel waerd en is, als het zekere ende tegenwoordige'.

[4] Buchanan 1960 *SALJ* 187.

[5] Reinecke 1976 *TSAR* 26 31.

[6] *Chaplin v Hicks* [1911-13] All ER 224 (CA) followed in *Trichardt v Van der Linde* 1916 TPD 148; *Davies v Taylor* [1974] AC 207 (HL) 213. See too McGregor 'Damages' 14ed 196-203; Luntz 'Damages' 2ed 82-3 'A plaintiff who has been deprived of all or part of his earning capacity has in reality lost the chance of exploiting that capacity to the full'; Cooper-Stephenson & Saunders 'Damages in Canada' 91-8.

[4.1.4] Future loss: With future loss the technique of value of a chance tends to become obscured by misplaced emphasis on the 'period' over which future loss of income or support is to be discounted. The remarriage prospects of a widow have, for instance, been couched in terms of a period until remarriage.[7] This is an erroneous and misleading form of analysis because the vast majority of widows will never remarry.[8] Thus, for example, a 10% remarriage deduction for a widow aged 50 converts to a period until remarriage of 25 years,[9] that is to say remarriage at age 75. Clearly an absurd conclusion. The widow will either remarry within a few years after the death or not at all.[10]

Another example of the future loss of the value of a chance is the loss of inheritance prospects arising from the death of a breadwinner.[11] Yet another example is compensation for uncertain promotion prospects.

[4.1.5] Desirable technique: The technique of value of a chance greatly facilitates giving effect to the ideal goal of comprehensive compensation.[12] This is particularly so within the framework of the lump-sum once-and-for-all rule . It is preferable that a plaintiff receive 10% of his loss than nothing at all. Both Van der Walt and Boberg acknowledge the desirability of the principle of value of a chance under circumstances of lump-sum once-and-for-all compensation.[13] The methodology is well established in other jurisdictions.[14]

It has been said of the technique 'That is not a very satisfactory way of dealing with such difficulties, but no better way exists under our procedure'.[15] Instalment compensation, we may note, would eliminate uncertainty as regards a future medical procedure but cannot bring

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[7]*Legal Insurance v Botes* 1963 1 SA 608 (A) 617inf; Boberg 1966 *SALJ* 402 407-9 'Remarriage is relevant because it reduces the period of dependency'; Boberg 1988 *BML* 55 56 'The whole object of reducing damages for remarriage is to ensure that, theoretically, nothing remains of the award by the time the widow remarries'.

[8]See table of remarriage rates published 1988 *De Rebus* 67 70.

[9]For details of the calculation see 326.

[10]See 324 for further discussion.

[11]*Groenewald v Snyders* 1966 3 SA 237 (A) 248E item (b). This value may be roughly calculated by estimating the inheritable estate at the end of the breadwinner's expectation of life (usually by adding inflation to the present value), discounting for interest and then applying a further discount for the chance that the wife would not have been alive to inherit. Further deductions are made for general contingencies. Actuaries use a more accurate year-by-year method (see Milburn-Pyle & Van der Linde 1974 *TASSA* 292 315 where the *spes* value is represented by A in the formula 1-A). For more detail see 330 below.

[12]See paragraph 3.3.6.

[13]Boberg 'Delict' 477-8; Van der Walt 'Sommeskadeleer' 447 but not without heated criticism of the lump-sum once-and-for-all rule. Van der Walt glosses over the problem of uncertainty in relation to hypothetical events and tends to emphasise *damnum emergens* rather than *lucrum cessans*. *Chaplin v Hicks* [1911-13] All ER 224 (CA) is not mentioned in his case index.

[14]Luntz 'Damages' 2ed 82-3 91-2; Cooper-Stephenson & Saunders 'Damages in Canada' 91-102 108-10; McGregor 'Damages' 14ed 197-203.

[15]*Burger v UNSBIC* 1975 4 SA 72 (W) 75G.

a deceased breadwinner back to life or throw light on lost prospects of promotion.[16] This point is most clear when one considers the loss of a chance in the past.[17] For *lucrum cessans*[18] the technique is unavoidable regardless of what procedural regime is adopted.

The recognition of value of a chance as an explicit separate technique of assessment may be viewed as a major step forward from the agglomerated 'jury'[19] approach towards a more scientific approach.[20] It nonetheless retains its 'general-damages' character in the sense of being a substantially subjective[21] determination based on what seems reasonable at the time of assessment.[22]

[4.1.6] Probabilities and possibilities: What is in modern times described as 'probability theory' used to be known in the nineteenth century as the 'theory of chances'. The older terminology distinguished between **probabilities**, that is to say chances greater than 50% and **possibilities**, that is to say chances of less than 50%. Modern financial and statistical literature uses the word 'probability' to designate a chance in general, be it greater or less than 50%. One also encounters instances where the word 'possibility' is used merely to designate uncertainty without any intention of suggesting a chance of less than 50%.[23]

The most common manifestation of the technique of value of a chance is the deduction for general contingencies.[24] This deduction is made from both past and future losses.[25] **Possible** losses, both past[26] and future,[27] are compensated in like manner with a suitably

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[16]See, for instance, *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 59 where the court ordered that allowance be made for a 50% chance of promotion.

[17]See, for instance, *Chaplin v Hicks* [1911-13] All ER 224 (CA) followed in *Trichardt v Van der Linde* 1916 TPD 148.

[18]See paragraph 3.2.7.

[19]The 'some-how-or-other' method (Boberg 1964 *SALJ* 194 204).

[20]*Reid v SAR&H* 1965 2 SA 181 (D) 190H; Koch 'Damages' 2; McGregor 'Damages' 14ed 1029-30 1043-45; Munkman 'Damages' 4ed 54; Atiyah 'Accidents, Compensation & the Law' 3ed 39.

[21]If suitable statistics are available (as for remarriage or death) then the relevant chance may be determined from such statistics.

[22]Savage 'Bayesian Econometrics' 112-13. That is a subjective estimate of a fair price for which the plaintiff now foregoes the right to bring an action if and when the expense actually does arise (see Buchanan 1960 *SALJ* 143 144-5; McGregor 'Damages' 14ed 176-7 190-2).

[23]See too discussion of the expression *certa spes* at 76.

[24]Boberg 'Delict' 487. The expression 'general contingencies' encompasses a wide variety of considerations other than risk (see Corbett & Buchanan 3ed 89-96). Uncertainty nonetheless remains the primary consideration (see 149 below for a more comprehensive discussion).

[25]See table of deductions in Koch 'Damages' 334-8. There is no fundamental difference between past loss and future loss other than that some of the uncertainty has been eliminated by unfolding reality (*Sigournay v Gillbanks* 1960 2 SA 552 (A) 557inf).

[26]*Chaplin v Hicks* [1911-13] All ER 224 (CA) followed in *Trichardt v Van der Linde* 1916 TPD 148.

[27]*Burger v UNSBIC* 1975 4 SA 72 (W) 75D-G (emphasis supplied); approved in *Blyth v Van den Heever* 1980 1 SA 191 (A) 225-6; see too *Van Oudtshoorn v Northern Assurance* 1963 2 SA 642 (A) 650-1; *Kwele v Rondalia Assurance* 1976 4 SA 149 (W) 152-3.

large deduction to allow for the very substantial uncertainty attaching to the loss. The technique is also appropriately described as a 'discount for risk'.[28] When damages are reduced for general contingencies[29] the defendant is being given credit for the possibility that the loss is not suffered. Even-handed justice dictates that the claimant be given credit for possible losses and vice-versa.

It has been held that an expected future benefit from employment should be ignored because it is discretionary.[30] Considerations of value of a chance and comprehensive compensation suggest that the proper procedure is to allow the benefit but to make a suitable deduction for the contingency that the discretion may be adversely exercised.[31]

[4.1.7] Balance of probabilities: For a criminal conviction proof beyond a reasonable doubt is required. For a civil action it is sufficient that the facts be established on the balance of probabilities, that is the alleged fact will be accepted as proven if on the basis of the evidence before the court it seems more likely than not that the fact is correct. A decision based on the balance of probabilities reflects a judicial opinion as to the probative value of the evidence before the court. The procedure implies the existence of a past event or present state of affairs. Our human condition prevents us having knowledge of future events but **a witness may validly testify as to his beliefs concerning future events.** The state of mind of the witness as regards future events is a question of fact. Many events, such as marriage or continuing employment, are known to occur with greater or lesser likelihood. Although accurate prediction in respect of any one individual is not possible, averages[32] and frequencies of occurrence for large groups can be predicted with some degree of confidence.[33] It is these perceptions of future possibilities and probabilities that form the basis of value judgments concerning the present price for which to exchange the prospect of an uncertain future financial gain or loss.[34]

Some judges view the technique of valuation of a chance as applicable to possibilities only.[35] One may certainly point to recent judgments where no deduction has been made for

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[28]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 116inf 'the rate of the discount'.

[29]*General Accident Insurance v Summers* 1987 3 SA 577 (A) 614H 'Ek veronderstel natuurlik dat daar by elke berekening behoorlik vir onsekere gebeurtenisse ('contingencies') toegelaat word'. The deduction for general contingencies is a complicated topic which covers many considerations other than pure risk (see 149 below).

[30]*Gehring v UNSBIC* 1983 2 SA 266 (C).

[31]*Parry v Cleaver* [1969] 1 All ER 555 (HL) 576I 'If pensions in general are to be taken into account, then such a discretion (to pay) does not take them out of account. It merely calls for some large or small or negligible discount in the value to be attached to the pension, according to whether the withholding of it is a real practical danger or (as in most cases) a mere theoretical danger'. See too *Serumela v SA Eagle Insurance* 1981 1 SA 391 (T) 392-3; *Krugell v Shield Versekeringsmpy* 1982 4 SA 95 (T) 102-4.

[32]Such as the average expectation of life used so extensively for damages calculations.

[33]See section 5.6.

[34]See 15.

[35]See paragraph 4.1.6.

the chance of non-occurrence of a probable loss in the future.[36] These judgments take the view that the loss has been proved on the balance of probabilities and may thus be accepted as a certainty. The question of a deduction for the contingency of non-occurrence is then, quite unjustifiably, ignored.[37]

[4.1.8] Certa spes: The expression '*certa spes*' highlights the potential ambiguity in dealing with value of a chance and proof on the balance of probabilities. Voet[38] states that the chance (*spes*) for which compensation is to be awarded must be neither too speculative (*nimis incertum*) nor too remote in time (*nimis longe*) but must nonetheless be established on the balance of probabilities (*certa*). The chance itself may be small, perhaps 5% or 10%, but nonetheless substantial. A *certa spes* is a *spes* which is more than just a figment of the imagination, a flight of fancy pressed to extinction by the weight of accumulated contingencies.[39] Buchanan[40] has pointed out that the word 'likelihood' does not necessarily denote a probability. It can be used to denote any reasonably foreseeable possibility,[41] that is to say a *certa spes*.

[4.2] APPORTIONMENT OF DAMAGES

The technique of value of a chance is not the only instance where one finds a scaling down of the liability of the defendant. Liability for the damages will be apportioned between the wrongdoer and the victim.[42] A similar apportionment of liability has been adopted between multiple contingent wrongdoers.[43]

The similarity between an apportionment of damages and the technique of value of a chance is unmistakable. Both involve a scaling down of the liability for damages. One may speak

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[36]*Fortuin v Commercial Union Assurance* 1983 2 SA 444 (C) and comments by Davel 'Broodwinner' 416n85; *Modern Engineering Works v Jacobs* 1949 3 SA 191 (T); *Pallas v Lesotho National Insurance* 1987 3 C&B 705 (ECD) 713; *Hotson v East Berkshire Area Health Authority* [1987] 2 All ER 909 (HL) and comments by Fleming 'Probabilistic causation in tort law' 1989 *CBR* 661 672-5. Van der Walt 'Sommeskadeleer' 274-6 would seem to advocate this approach to future loss.

[37]In general the courts will make a deduction for the contingencies attaching to expected expenditure: *Kriel v Administrator-General, SWA* 1986 3 C&B 539 (SWA) 551inf (25%); *Ncubu v NEG Insurance* 1988 2 SA 190 (N) 198B (15%).

[38]'*Dummodo lucri affulserit certa spes; nam si illud vel incertum nimis, vel nimis longe petitum, eius habenda ratio non est*' (Voet *Ad Pandectas* 45.1.9). Erasmus 1975 *THRHR* 268 269 states in this regard that 'The expectation of profits must, however, have been certain to render the defendant liable for the loss'. I assume that by 'expectation of profits' Erasmus means 'value of a chance'.

[39]Reinecke 1976 *TSAR* 26 31 'Bewys sal gelewer moet word dat die vervulling van die vermoënsverwagting voor die plaasvind van die gewraakte gebeurtenis so waarskynlik was dat dit redelikerwys 'n geldelike waarde vir die betrokke persoon gehad het'; see too Savage 'Bayesian Econometrics' 114-15. Actuaries used to be trained to place a value for purposes of sale on inheritance prospects (Benz & Tappenden 'Valuation of reversions and life interests').

[40]Buchanan 1960 *SALJ* 187 190n14.

[41]*Joffe & Co Ltd v Hoskins* 1941 AD 431 451; *Bristol Laboratories Inc v Ciba Ltd* 1960 1 SA 864 (A) 873sup. Buchanan points out that Clerk & Lindsell *Torts* 12ed 395 para 643 use the phrases 'likely to occur' and 'may occur' as synonymous. See too *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1024E/F where the court uses the word 'probability' in the statisticians' sense of a chance greater or less than 50%.

[42]Apportionment of Damages Act 34 of 1956.

[43]Fleming 'Probabilistic causation in tort law' 1989 *CBR* 661 664-9.

of the 'degree of causation' in relation to an uncertain future event.[44] Natural phenomena such as early death or economic adversity may be viewed as part causes of loss of earnings or support and then dealt with by a percentage deduction from the total possible damage. The need for medical costs may be terminated by the early death of the victim with a consequent reduction in the damage suffered.[45] Apart from natural phenomena a victim has a duty of care in the sense that he is required to mitigate his damages. In suitable circumstances his own conduct subsequent to the injury may be viewed as the cause of part or all of his own losses.[46] Other events such as medical negligence or assault may serve to compound the damage suffered and introduce further wrongdoers liable for part of the loss suffered.[47]

It has been said by the appellate division that there is a close relationship between causation and the technique of value of a chance.[48] The considerations giving rise to this observation are by no means clear but one may surmise that they were concerned with scaled down or apportioned liability. One may note that judicial causation is concerned with the limitation of damages.[49]

Although the technique of value of a chance may involve the scaling down of damages in proportion to the chance of occurrence, it also involves the award of damages for possibilities, items of loss which would be disallowed if regard were had solely to probabilities in the sense of chances greater than 50%. In this sense the technique of value of a chance is not a form of limitation of liability, as is generally the function of legal causation, but rather a procedural technique that enables the court to effect the most comprehensive possible compensation.[50]

[4.3] ILLUSTRATIVE EXAMPLES

[4.3.1] A finding of fact: A medical expert may testify that according to his experience one hip operation in ten will require a major revision within three years and that the plaintiff is faced with the risk of substantial expenditure. Another medical expert may testify that all hip operations are good for 15 years. The court is then required to make a finding on the credibility of these witnesses. This finding will be based upon the balance of probabilities.

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[44]Fleming 'Probabilistic causation in tort law' 1989 *CBR* 661 discusses the allocation of liability for partial causation.

[45]Reinecke 1976 *TSAR* 26 34inf.

[46]See, for instance, *Mafesa v Parity Versekeringsmpy* 1968 2 SA 603 (O). *S v Mokgethi* 1990 1 SA 32 (A) was concerned with a criminal charge of murder where the victim's own negligence had accelerated the onset of death.

[47]*Bekker v Constantia Insurance* 1983 1 PH J13 (E); *Minister of Communications & Public Works v Renown Food Products* 1988 4 SA 151 (C); Cooper-Stephenson & Saunders 'Damages in Canada' 626-635; Hart & Honoré 'Causation' 247n3&4. Neethling Potgieter & Visser 'Deliktereg' 2ed 189 ''n gebeurtenis net as *actus novus interveniens* sal kwalifiseer as die gebeurtenis *nie redelikerwys voorsienbaar was nie*'.

[48]*Blyth v Van den Heever* 1980 1 SA 191 (A) 226A '...it is not always possible to distinguish clearly between causation and quantification in this sphere'. Reinecke 1976 *TSAR* 26 39 'Die skadebegrip is dus weliswaar gevolgsomskryf maar die suiwer skademaatstaf behoort neutraal teenoor kousaliteitsmaatstawwe te staan'.

[49]'Wat juridiese kousaliteit betref, beklemtoon hy tereg dat dit nie hier in werklikheid oor *kousaliteit* gaan nie, maar oor aanspreeklikheidsbegrensing of toerekenbaarheid van skade...' Neethling & Potgieter 1993 *THRHR* 157 158.

[50]See 50.

The court may find that there is a 10% chance of an expensive revision operation within 3 years. This then becomes an accepted fact to be applied when assessing compensation. The claimant will be awarded 10% of the cost of the operation.

[4.3.2] A choice of alternatives: It is clear that if the need for a revision operation arises the plaintiff will have far too little money. If the need does not arise the plaintiff will have gained. It is situations of this nature which provoke agitation for instalment compensation. In practice the plaintiff would probably have been offered a 'provincial hospital certificate'[51] but refused to accept it by reason of the excessive delays with admission to a state institution. We see here utility in action. The plaintiff can choose between having all costs covered but with inconvenient delays, or receive 10% of the required money with a 100% assurance that the funds can be applied immediately to buying, for example, a new hi-fi set.[52] The plaintiff and his advisors may well be very happy with an award of 10% of the cost of the operation, even if idealists are not. In general it seems that plaintiffs prefer lump sums to instalments.[53] This preference is probably shared by legal advisors who usually need to look to their client for payment of those legal costs which the defendant does not pay.[54]

[4.4] CONCLUSIONS

The damages to be awarded for an uncertain past or future loss will be discounted having regard to the chance that the loss will occur, or would have occurred. This discount applies to chances both greater and less than 50%. By reason of the discount the award cannot be used to cover an actual future expense, or loss of earnings or support, when the time comes. The value calculated using the technique of value of a chance is the present utility of the prospective loss. Restitution is only effected in the abstract sense of topping up the present utility of the victim's life plan.

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[51]Purportedly in terms of article 43 of MMF agreement ito Act 93 of 1989. Such a 'certificate' entitles the holder to free treatment at a provincial hospital. *Maja v SA Eagle Insurance* 1987 4 C&B B2-1 (W) held that a claimant is not obliged to accept such a certificate guaranteeing free treatment at a state hospital. *Munro v NEG Insurance* 1988 4 C&B F2-1 (D) ruled that the proposed undertaking was not as intended by the relevant Act and thus the court could not make it an order of court.

[52]It is for this reason that the present value discounted for risk is termed a 'substitution rate' (Savage 'Bayesian Econometrics' 112-13).

[53]Pearson Cmnd 7054 1978 vol 1 155 para 716; Luntz 'Damages' 2ed 26. See quotation at 42 above.

[54]These are, it seems, often quite substantial. Future research as regards instalment compensation would do well to address the problems created by legal costs recoverable from the claimant (see, for instance, *Hughes v Santam Insurance* 1988 (W) (unreported 29.9.88 case 20704/86)).

CHAPTER 5

THE CHANCES OF LIFE AND DEATH

Summary: *The average expectation of life is a point estimate obtained by summing the survival chances for all possible years of life to age 99 and beyond. The chance of inheritance is similarly calculated but with the chance of death in each year substituted for one of the survival ratios. The standard actuarial calculation for ascertaining present value proceeds by taking the value of the chance in each year of the relevant income or expenditure and then summing the resulting series of separate values. It is generally unsound to suggest that by consuming interest and capital a claimant may reproduce the income that has been lost.*

[5.1] DEFINITIONS

The chances of life and death have been the subject of exhaustive analysis over the last 300 years.[1] This chapter discusses the workings the risks of life and death. By actuarial standards the techniques discussed here are fairly elementary and well within the computational ability of a layman equipped with a modern microcomputer and a spreadsheet package.[2]

[5.1.1] Period of survival: The single most prominent risk affecting the assessment of damages for personal injury and death is the contingency of life and death. It is usual to express this contingency as an average point estimate[3] called the 'expectation of life'. This is expressed as a number of years but may be as little as few months[4] or as much as 70 or 80 years. The expectation of life is popularly viewed as a prediction of when death will occur. This interpretation needs to be used with care because it can lead to seriously incorrect conclusions when dealing with marginal situations such as benefits after retirement and joint life expectancies.

Survival to advanced ages well in excess of 100 years has been recorded. For purposes of damages assessments it is generally adequate to assume age 99 to be the limit of life.[5] The discussion below proceeds on this basis. The limit of life is the age beyond which the chance

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[1]See 84.

[2]Such as LOTUS 123.

[3]See 15.

[4]See, for instance, *Gerke v Parity Insurance* 1966 3 SA 484 (W).

[5]See Neill 'Life contingencies' 7.

of survival is negligible. It is important to distinguish the limit of life from the 'expectation of life' in the statistical sense of an average.[6] Popular usage of the expression 'expectation of life' sometimes has in mind the limit of life.

Death is an event which is foreseeable as a certainty. What is uncertain is when death will occur.

[5.1.2] Chance of survival: The chance that a person now aged 40 will survive to age 65 is calculated by taking from the life table the number of survivors at age 65 and dividing this by the number of survivors at age 40.[7] The survival chance for a white female, for example, is 82,6%. It is assumed for purposes of the discussion that the life table used gives a fair indication of the true mortality risks.

[5.1.3] Chance of death: The chance that a person now aged 40 will die during the 65th year of age is calculated by differencing the survivors to ages 64 and 65 and then dividing by the number of survivors at age 40.[8] The chance of death for a white female, for example, is then 1,5%.

[5.1.4] The expectation of life: This is best described as an index by which to compare one life table with another. It is calculated by adding up the separate chances of survival for each individual year between the present age, say 40, and age 99 or older, the limiting age of the life table which is being used.[9] In this sense it is best described as the average duration of life because it is derived from life-table averages. Of particular importance in this regard is the concept of a series of chances of survival, one for each year between age 40 and age 99. These chances become less and less with advancing age and reduce to nil at the end of the life table. The importance of these chances is that they permit a calculation of a separate value of the chance of survival to each year between age 40 and age 99. The expectation of life falls between age 40 and age 99. The standard actuarial calculation is not terminated at the expiry of the expectation of life but at age 99, the limit of life.

The expectation of life is not generally used by actuaries.[10] The standard actuarial calculation proceeds on the basis of the year-by-year application of the value of the chance

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[6]See 80 and 81.

[7]Using SALT79/81 white females we have 79077/95760=0,826. This may be expressed as a percentage by multiplication by 100 giving 82,6%.

[8]SALT79/81 white females (80542-79077)/95760=0,0153 which is 1,53%. The chance of death between age 40 and 65 is 1 minus the chance of survival to age 65, ie 1-0,826=0,174, ie 17,4%.

[9]See example in table 5 at 88. Strictly speaking this gives a particular type of expectation called the 'curtate' expectation (see Neill 'Life Contingencies' 201-2). The reader need not concern himself with the fine distinctions between the different types of expectations. The main point to grasp is that they are obtained by a summation of separate chances of survival, usually on a yearly basis.

[10]Prevett 1972 *MLR* 140 147. The standard text for trainee actuaries mentions it only briefly under a chapter headed 'Population theory' (see Neill 'Life Contingencies' 201-2).

of survival to each relevant year.[11] Much of actuarial science is devoted to techniques for arithmetically manipulating these complex contingencies.

[5.1.5] Reduced expectation of life: The evidence may indicate that a claimant has a reduced expectation of life.[12] **This means that the chance of early death has been increased** and that the life table must be recalculated so that the survival chances for each separate year add up to the reduced life expectancy. The adjustment to the chances of death will often be expressed in the form 'plus 100% extra mortality',[13] for example, that is to say the risk of death in any one year is doubled. Hrubec & Ryder report 40% more deaths for persons with a limb amputation.[14] For serious brain injuries Roberts reports studies which indicate a reduction in life expectancy of about 4 years.[15] For paraplegics, quadriplegics and epileptics the risk of death due to their condition does not increase with advancing age although the underlying risk of death does increase, as for any normal member of the population. For such persons it is preferable to adjust the life table by a constant addition to the risk of death such as 1% of survivors at the beginning of each year.[16]

Consider a white female aged 40 whose life expectancy has been reduced by 10 years. Had she not been injured her expected age at death would have been 76,75 years.[17] Now that she is injured her expected age at death has been reduced to 66,75 years. Some analysts might conclude that her reduction in life expectancy does not affect the value of her earnings up to age 65. This would be an invalid conclusion because, as has been stated above, reduced life expectancy implies that the risk of early death has been increased. The reduction of 10 years to life expectancy would in fact reduce the value of the claim for loss of earnings by 8,5%.[18]

[5.1.6] Anecdotes and averages: Each individual has a personal perception of survival, the

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[11]Newdigate & Honey 'MVA Handbook' 167; *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1024G-H. See 88 below.

[12]See, for instance, *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1024-27.

[13]An actuary would probably prefer to see this expressed algebraically in the form +k%.

[14]Hrubec & Ryder 33 (1980) *J Chron Dis* 239-50. 'The lack of physical exercise makes him a candidate for coronary artery disease and obesity' *August v Guardian National Insurance* 1990 4 C&B E2-13 (C) 14.

[15]Roberts 'Severe accidental head injury' 1979 148-51. Earlier in the same chapter Roberts attempts to analyze extra mortality by separating normal deaths from death directly caused by brain injury. This approach is statistically unsound in that it presumes that medical practitioners are capable, many years after the event, of accurately identifying the cause of death. Brain injury has a variety of subtle life threatening effects, one of these being to reduce the victim's ability to identify his own illnesses and to manage them. The scientifically correct approach to measuring mortality is to take a population of brain injured persons and compare the number of deaths from this population with the number of deaths in the normal population.

[16]Thus if the normal risk of death in a 12-month period is 4% then the adjusted risk is 5% (4%+1%). If the normal risk of death in a subsequent 12-month period is 6,5% then the adjusted risk is 7,5% (6,5%+1%), and so on. For more detail see Fisher & Young 'Life assurance' 134-9.

[17]SALT79/81 females (40+36,75).

[18]Using 2,5% per year net capitalization rate (see 130) and an extra mortality of 173%. *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) ruled that when assessing loss of earning capacity the calculations for both the injured and uninjured conditions should be based on the reduced life expectancy (see 225 below).

utility of the duration of life. The biblical three score years and ten probably colours this perception to a substantial degree. For many younger persons the difference between a prospect of death at age 70 or age 170 is of scant significance, so remote is it in time. For some persons the expression 'expectation of life' implies the limits of life, age 90 or 100 and beyond. Such longevity is, however, only a remote possibility. For compensation purposes one needs to objectivize the expectation of life[19] and balance the prospect of possible longevity against possible early death. This implies the concept of an average expectation of life.

Medical experts are often consulted as regards the effect of injuries on the expectation of life. Not all such experts are astute to use the average expectation and one quite frequently finds opinions as to expectation of life couched in anecdotal terms: 'I know of a paraplegic who has lived the normal span. A normal lifespan is possible therefore all paraplegics have a normal life expectancy'.[20] In practice the average expectation of life for paraplegics is below normal.[21]

Another form of medical opinion that gives rise to some degree of confusion arises when there is, for example, a 20% risk of epilepsy. The opinion will often be expressed that provided epilepsy does not occur the expectation of life is normal. The fact of the matter is that if there is a risk of epilepsy then there is an associated increased risk of early death,[22] and thus an immediate reduction to life expectancy. The risk exists even if epilepsy as a certainty does not.

Not all evidence leads to reduced life expectancies. Evidence of a family history of longevity may justify a longer-than-normal life expectancy.[23]

Medical opinion concerning life expectancy, if it is to be accurate, should specify the life table considered normal and the effect in relation thereto of the victim's condition. Most medical experts have only limited access to life tables and the interpretation thereof and their opinions should ideally be formulated in consultation with an actuary, as is done by medical underwriters at a life office. The focus of medical inquiry in relation to damages claims is usually on whether the life expectancy of the victim has been reduced. It is often relevant, however, to consider the effect on life expectancy of pre-existing conditions such angina, a history of heart attacks, multiple sclerosis, diabetes, tuberculosis, etc. The question of AIDS

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[19]See 22.

[20]This approach equates life expectancy with the limit of life.

[21]Walsh & Yeo 1985 *FESPIC* 142 report for Australia under optimal care conditions a 5% reduction for paraplegics and a 15% reduction for quadriplegics. Geisler (1983) 21 *Paraplegia* 364 reports very much heavier rates of mortality. The two papers both cover much the same period of time. The observed differences are thus not explained by improvements in medical science. Walsh & Yeo have probably observed a very much more affluent and better educated sector of society.

[22]Brackenridge 'Life Risks' 2ed 604-8 reports extra mortality for epileptics ranging from nil to +200%. Laidlaw & Richens 'Epilepsy' 28 report for the USA that 'the rates are significantly higher for non-whites. This applies particularly to males for whom the rates are three times as high as those for whites'.

[23]*Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 721-2.

has to date not received much attention from the courts.

[5.2] HISTORICAL BACKGROUND

[5.2.1] Ulpian's table: The life table recorded by Ulpian[24] is of considerable historical importance. For over 1000 years it was the primary reference for length of life for jurists following the Roman-law tradition.[25] Kopf[26] suggests that it may reflect the mortality experience of the mutual aid societies which provided pensions to Roman legionaries after their retirement at age 46.

TABLE 3 - ULPIAN'S LIFE TABLE

Age	Multiplier
0-20	30
21-25	28
26-30	25
30-35	22
36-40	20
40-50	60 minus age minus 1
50-55	9
55-60	7
61 and over	5

An abridged version provides for the expectation to be taken as 30 years up to age 30 and thereafter 60 minus age with 5 years being used for anyone over age 55. This rule-of-thumb was popular with jurists.[27]

There is reason to believe that Ulpian's table records not life expectancies but annuity factors which include a discount for interest: The original purpose of Ulpian's table was to capitalize usufructs over property for estate duty purposes.[28] The value of a perpetuity[29] is based on a multiplier of 30 years. This implies a net capitalization rate of 3,3% per year. For young persons Ulpian's table limits the period to 30 years, falling far short of the biblical 'three score years and ten'.

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[24]D35.2.68.

[25]Davel 'Broodwinner' 7-17. The word '*lijfrente*' used by Grotius '*Inleiding*' 3.33.2 is a reference to Ulpian's table.

[26]Kopf (1927) 13 *PCAS* 225 232 233.

[27]See, for instance, Matthaeus '*De Criminibus*' 47.4.5 48.7.11; Azo '*Institutiones*' 4.4.11.

[28]D35.2.68 is concerned with 'The law of 5% tax of estates'.

[29]Regular yearly, or more frequent, payments which never cease.

[5.2.2] Modern life tables: The intuitive perception of a life table is that of a table of life expectancies. Life expectancies are difficult to measure directly and do not lend themselves to sophisticated mathematical treatment. The introduction in 1662[30] of a life table based on survivors at selected ages anticipated the flexible modern life table. The SALT79/81 table[31] shows for a notional 100000 born the number surviving to each age up to age 90.[32] From this table of survivors may be calculated related factors: the chance of survival, the chance of death, the expectation of life. Most life tables are constructed from direct observations of death rates over fairly short periods of time and the associated lives exposed to the risk of death, what one might call a 'snapshot basis'.[33]

[5.3] RESTITUTIO IN INTEGRUM

Consideration of the expectation of life as a number of years free of the risk of death can lead one into the error of thinking that something approximating perfect restitution is possible. I have already pointed to the construction of the expectation of life from the accumulated sum of intervening chances of survival.[34] I will now examine some further features of the chances of death and survival.

TABLE 4 - EXPECTED AGE AT DEATH

Attained Age	Expected Age at Death
40	76,75
60	77,54
70	79,33
75	80,96
80	83,26

SALT79/81 white female mortality

[5.3.1] 'End-of-the-rainbow' phenomenon: The most notable feature of the expectation of

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[30]By John Graunt. His table based on christenings and burials in the City of London was too imprecise to be of any real value (Dublin & Lotka 'Length of Life' 40-2; Benjamin & Haycocks 'Analysis of Mortality' 385-9).

[31]Department of Statistics (whites coloureds asiatics); the 1984-86 tables are those most commonly in use for compensation purposes in 1993 (see *Quantum Yearbook* 1993 72-83). These are differ little from the older tables.

[32]For reasons of convenience. These tables extrapolated to age 99 appear in 1986 *De Rebus* 551 552-4. Survival beyond age 99 is rare but not unknown.

[33]Cox 'Demography' 198-200. Life offices are able to use more sophisticated methods due to their extensive policyholder data (see Benjamin & Haycocks 'Analysis of Mortality' 35-51.

[34]See table 5 at 88.

life is that as a person gets older the expected age at death advances into the future.[35] This point is illustrated in table 4.
The expected age at death is thus like the pot of gold at the end of a rainbow, fleetingly unattainable. This phenomenon has the important consequence that if a plaintiff has been compensated at age 40 on the basis of consuming interest and capital to replace the required income[36] **and acts precisely in accordance with this directive** then the capital will be exhausted by age 77.[37] By that time the expected age at death will have increased to over 81 years.

From a statistician's point of view the advancing of the expected age at death to older ages would be described as a Bayesian revision of the expected age at death based on the new information that the plaintiff had actually survived to an older age.[38] Jurists would describe this procedure as 'taking account of events supervening between date of death and date of trial'.[39]

[5.3.2] Expectation of working life: The vast majority of compensation matters are concerned with the working lifetime of the plaintiff. It is usual to assume retirement at age 65 although ages ranging from 45 to 80 and beyond are encountered in practice.[40] The standard actuarial calculation includes a substantial deduction for the risk of early death. It follows that the lost income cannot be reproduced by consuming interest and capital over the expectation of working life as calculated by an actuary. The same conclusion follows from the end-of-a-rainbow phenomenon.[41] Actuaries testifying in court have experienced singular difficulty with explaining the process of discounting for risk for a single individual.[42] Actuarial literature records the following hypothetical exchange in court:[43]

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[35]Boberg 1963 *SALJ* 538 545n29; Davel 'Broodwinner' 507n536 record this phenomenon.

[36]See *Gillbanks v Sigournay* 1959 2 SA 11 (N) 15A; *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 838-9.

[37]Provided earlier death has not intervened.

[38]Savage 'Bayesian Econometrics' 44 60 65.

[39]*Wigham v British Traders Insurance* 1963 3 SA 151 (W) 155-6: Plaintiff aged 81 with an expected age at death of 87 survived pre-trial period of 3 years and then had an expected age at death of 89 '... the Court is entitled in the case of prospective damages to inform itself of subsequent facts which are known at the date of the trial and which if taken into account would enable the Court to determine with a greater degree of certainty or accuracy the actual loss of a plaintiff'.

[40]Davel 'Skadevergoeding' 108 comments on the general acceptance by the courts of age 65 as standard retirement age and the absence of evidence to indicate other retirement ages. The court records reflect only a very small proportion of claims. My own experience is that a wide variety of retirement ages are used and that allowance will generally be made for a post-retirement pension, if not for post-retirement employment.

[41]See paragraph 5.3.1.

[42]Younger actuaries are these days receiving training in utility theory. One may thus expect to see utilitarian reasoning advanced in years to come.

[43]Crocker 1980 *TIAA* 517 586-7.

'**Judge**: "Just a moment, Mr Actuary, I don't quite follow that line of argument. You say that $300 will replace a $1 per week over the lifetime[44] of the plaintiff or until he attains age 65, whichever is earlier."
'**Actuary**: "Yes, Your Honour."
'**Judge**: "But what happens to the $300 if the plaintiff dies in 6 months time?"
'**Actuary**: "The greater part of the $300 will be remaining, Your Honour."
'**Judge**: "But you said that $300 would provide the income just over the plaintiff's lifetime." Here follows a long circular explanation by the actuary about averages etc which confuses the judge even more and raises the actuary's pulse.
'**Judge**: "Well, just let us leave that argument aside for one moment. Let us examine the situation in say 20 years' time[45], Mr Actuary, which you state in your certificate is the life expectancy of the plaintiff. Will the income be provided by the $300 for this period?"
'**Actuary** will probably say - to simplify the argument: "Yes, Your Honour".
'**Judge**: "And what part of the $300 will then be remaining?"
'**Actuary**: "Very little, Your Honour."
'**Judge**: "Well, from where is the plaintiff going to obtain his $1 per week until age 65, which is then still 5 years off?" At this stage the actuary gives up'.

The 'expectation of working life' discussed above is calculated in the same way as the full expectation of life save that chances of survival after age 65 are ignored. The expectation of working life terminates several years before normal retirement age because it includes allowance for early death. Thus for a coloured male aged 40 the period to age 65 is 25 years but the expectation of working life is 19,88 years, that is to say it expires just before the 60th birthday.

[5.3.3] Contingency of early death: The above quotation discusses a possible working lifetime of 25 years with an expected working lifetime of just short of 20 years. This reflects a deduction for the contingency of early death of 20%. This deduction is made by the actuary as part of his calculations. The court will usually make a further deduction for general contingencies of about 10%, giving a total deduction for all contingencies of about 30%.[46] We can observe here an application of valuation of a chance. We have earnings as a certainty calculated over 25 years less 20% for the chance of early death[47] less a further 10% for other contingencies.

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[44]The word 'lifetime' is here clearly intended to mean 'working lifetime', ie expectation of working life as distinct from the full expectation of life. This looseness of terminology is common in both South Africa and, it seems, Australia.

[45]Crocker's paper uses the period 23 years. I have replaced this with 20 years to bring the flow of the argument into line with the calculation example given below this quotation.

[46]Strictly speaking 28% (0,28=[1-0,8x0,9]).

[47]A number of writers have pointed to the failure by the courts to appreciate that a calculation by an actuary includes allowance for the contingency of early death: Boberg 1964 *SALJ* 194 204n54; Street 'Damages' 120; Luntz 'Damages' 2ed 280; see, for example, *Ncubu v NEG Insurance* 1988 2 SA 190 (N) 193H 198A. Not all courts miss the point, see *Bester v Silva Fishing Corp* 1952 1 SA 589 (C) 600B 'In the determination of the expectation of life due regard has been had to the probability of earlier demise' ('probability' here used in the sense of a chance less than 50%).

[5.3.4] To put in the position he would have been in: The 'gross multiplier method'[48] envisages a yearly payment discounted at interest over a period, the expectation of life[49] or the expectation of working life.[50] By this means the courts often presume to effect *restitutio in integrum*, an exact replacement of the lost income.[51] The phenomenon of increasing expected age at death, the end-of-a-rainbow anomaly, demonstrates that the gross multiplier approach does not achieve perfect restitution. A similar problem is apparent when one uses a working lifetime discounted for the risk of early death. The actuarial year-by-year method[52] demonstrates that the end-of-a-rainbow problem is but one manifestation of the more fundamental problem with the value of a chance. The result is always the same - the compensation money will either be too much or too little but seldom, if ever, just right. Precisely how we can explain and justify a measure of damages based on an average, the expectation of life at the time of making the award, requires a closer look at utility theory.[53] Utility theory, as I have already noted, indicates that restitution is achieved in terms of a 'price in a manner of speaking' representing the present utility of the future income, that is to say the lump-sum payment. The claimant's present lump-sum utility is restored. Restitution is not achieved in terms of the future income represented by that lump sum.

[5.3.5] The risk of living too long: There is a substantial risk, of the order of 50%, that a plaintiff will survive beyond the age indicated by his expectation of life. The prudent plaintiff[54] should have regard for the likelihood[55] that he will outlive his original actuarially determined expectation of life. Such a plaintiff should have the sense to ignore suggestions that he consume all capital by the expiry of his original expectation of life.[56] A safer investment policy would be directed towards preservation of a substantial proportion of capital throughout life in order to provide for the contingency of longevity, like any other person.

[5.4] THE ACTUARIAL YEAR-BY-YEAR METHOD

[5.4.1] Sliding-scale survival chances: We have observed that the modern life table is based on the notion of survivorship, the number alive at a selected age from an original hypothetical cohort of 100000 who were all born at the same moment. From this table may be calculated the proportion of those now alive who are expected to survive to a specified

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[48]Boberg 1964 *SALJ* 194 204-5; Davel 'Broodwinner' 511; Koch 'Damages' 47.

[49]See, for instance, *Bester v Silva Fishing Corp* 1952 1 SA 589 (C) 600B.

[50]*Nhlumayo v General Accident Insurance* 1986 3 SA 859 (D) 861I-J.

[51]*Nhlumayo v General Accident Insurance* 1986 3 SA 859 (D) 861I-J 'He was quite emphatic that his method was the way of **putting the plaintiff in exactly the same position as he would have been if there had been no accident**' (emphasis supplied). In this matter the court was concerned with the expectation of working life (at 861I) 'The sum which invested will produce an annuity which would theoretically expire in the course of his working life'. See too Crocker 1980 *TIAA* 517 586-7.

[52]Newdigate & Honey 'MVA Handbook' 167; *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1024G-H.

[53]See 5 et seq.

[54]The question of risk averse and risk seeking personalities has already been discussed (see paragraph 2.4.1).

[55]'Likelihood' is used here in the sense of '*certa spes*'.

[56]ie that prevailing at the time that the award is made.

TABLE 5 - GROSS MULTIPLIER & YEAR-BY-YEAR METHODS

	Gross multiplier method			Year-by-year method			
Age	Survival Ratios A	Interest Discount 16%py B	Present Value R10000x AxB	Survival Ratios C	Interest Discount 16%py D	Present Value R10000x CxD	Age
40	1.000	0.928	9285	0.995	0.928	9237	40
41	1.000	0.800	8004	0.984	0.800	7878	41
42	1.000	0.690	6900	0.973	0.690	6713	42
43	1.000	0.595	5948	0.961	0.595	5717	43
44	1.000	0.513	5128	0.949	0.513	4864	44
45	1.000	0.442	4421	0.935	0.442	4135	45
46	1.000	0.381	3811	0.922	0.381	3512	46
47	1.000	0.329	3285	0.907	0.329	2979	47
48	1.000	0.283	2832	0.891	0.283	2524	48
49	1.000	0.244	2441	0.875	0.244	2135	49
50	1.000	0.210	2105	0.857	0.210	1803	50
51	1.000	0.181	1814	0.838	0.181	1520	51
52	1.000	0.156	1564	0.818	0.156	1279	52
53	1.000	0.135	1348	0.796	0.135	1074	53
54	1.000	0.116	1162	0.774	0.116	900	54
55	1.000	0.100	1002	0.752	0.100	753	55
56	1.000	0.086	864	0.728	0.086	629	56
57	1.000	0.074	745	0.704	0.074	525	57
58	1.000	0.064	642	0.680	0.064	437	58
59	0.884	0.055	489	0.655	0.055	363	59
60	0.000	0.000	0	0.630	0.048	301	60
61	0.000	0.000	0	0.605	0.041	249	61
62	0.000	0.000	0	0.578	0.035	205	62
63	0.000	0.000	0	0.552	0.031	169	63
64	0.000	0.000	0	0.525	0.026	138	64
Σ	**19,884**		**R63790**	**19,884**		R60039	**Σ**

Note that due to rounding problems the total of 19,884 does not exactly match the total of the rounded figures shown in the table.

later age. Thus the SALT79/81 table for coloured males shows a figure of 77361 for survivors to age 40 and 39557 for survivors to age 65. The proportion expected to survive to age 65 is thus 51%, ie 49% of the group are expected to die before attaining age 65. It would be wrong however to assume from this statistic that a deduction of 49% should be made for the contingency of death prior to age 65. The expected working life from age 40 to age 65 based on the individual survival chances in each year is 19,88 years. This indicates a deduction of about 20% for mortality prior to age 65,[57] in lieu of the 48,9%

[57] 19,88/25=0,795, ie 79,5%. 100%-79,5%=20,5% which is 20% in round figures (SALT79/81 coloured male).

indicated by looking at survivors to age 65 only. The reason for the difference is that we are concerned with the average risk of death over the period.

[5.4.2] Yearly slices: The figures of the previous paragraph emphasise the need to cut the calculation into 'slices' which take account of the time at which the financial benefit is to be received. As a general rule earnings are received weekly or monthly. Life tables tend to work with yearly 'stops'.[58] The practical 'slice' is generally a yearly one.[59] The value of the chance that earnings of R10000 will be received at age 65 is 51% of R10000, ie R5100.[60] A similar calculation may be done for the value of earnings at ages 64, 63, 62, etc down to age 40. These individual values of a chance are summed to give the total value for R10000 per year over the entire period.

[5.4.3] An example: The calculation is illustrated in table 5[61] using a yearly payment of R10000[62] which remains fixed in nominal terms, that is to say does not increase with inflation,[63] a discount rate of interest of 16% per year, and SALT79/81 coloured male mortality.[64] The table also shows a comparable calculation using the 'gross multiplier method'.[65] The reader should note under column C how the expectation of working life of 19,884 years is obtained by adding up the individual chances of survival to each intervening year. For the gross multiplier method I have shown under column A the survival chances which are implicit to that cruder method[66]. The total rand value using the gross multiplier method is R63791 whereas that using the year-by-year method is R60038. I have deliberately used a high net capitalization rate (16% per year) in order to emphasise the

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[58]The mathematics of life contingencies discusses the problem in terms of infinitesimals and the 'force of mortality' (Neill 'Life Contingencies' 14-19).

[59]De Witt in Holland used half-yearly stops in his presentation to the States General made in 1671 (Bouwstoffen '*Levensverzekeringen en Lijfrenten*' 5-6). This seems to be the earliest recorded use of the year-by-year technique. De Witt's work was lost during the subsequent political upheaval. The year-by-year method first obtained general public recognition from the writings of De Moivre and Simpson during the years 1740-44.

[60]For sake of clarity of argument I have ignored the discount for interest. This is equivalent to an assumption that the discount rate of interest equals the expected rate of inflation. The former cancels out the latter. If no discount is made for interest then the gross multiplier and year-by-year methods yield identical results. The higher the net capitalization rate the greater the difference between the two methods.

[61]At 88.

[62]For reasons of convenience I have here assumed that the payment is made in the middle of each year. Payments made monthly or weekly may for calculation purposes be conveniently replaced with a single payment at mid-year for the same total amount.

[63]Such payments are not uncommon in compensation matters: Housing subsidies often take this form. Retirement annuities (pensions) in payment are often of a fixed monthly or yearly amount. It is common to find maintenance payments which do not increase.

[64]The chance of survival to the middle of a year is approximated by the average of the chances of survival to the beginning and end of that year.

[65]Boberg 1964 *SALJ* 194 204-5; Davel 'Broodwinner' 511; Koch 'Damages' 47.

[66]100% certainty of survival prior to expiry of the expectation of working life, 0% chance thereafter.

different results produced by these two methods.[67] When the calculation is done over the whole of life the differences become very much more pronounced.[68] The lower figure of R60038 would be considered by actuaries worldwide to be the preferable value.[69] It gives proper weight to the timing and contingencies attaching to the relevant payments.

[5.4.4] Restitution of income: What is evident from table 5[70] is that the individual yearly values, the yearly 'slices' reflecting the value of the chance of the income, have each been reduced for the contingency of early death. An important observation is that each 'slice' if invested diligently to produce investment returns equal to the discount rate of interest **will be inadequate when the time comes to fully replace the income lost**. This is so because of the deduction for the risks of death and general contingencies. The overall inadequacy is evident if one considers survival by the claimant to age 65.[71] For children who have lost support the deductions for the mortality of the parent during dependency are often of minor consequence (perhaps 1% or 2%).[72] It can then be correct for practical purposes to speak of consuming interest and capital to replace the lost support. It is otherwise with the example in table 5.[73] Restitution, as has already been noted, is achieved under lump-sum compensation in terms of present utility but not in terms of the future income represented by that present value.

[5.4.5] Contingency funds: The notion of consuming interest and capital has in mind the familiar home loan repaid by regular instalments, otherwise known as a 'sinking fund'. In its ideal form there is no risk or other uncertainty attaching to either the payments or the capital. When the payments are subject to the contingencies of human life and the accidents of employment and inflation there is no neat relationship between the payments and the present value of those payments. A fund established to cover uncertain future payments is appropriately termed a 'contingency fund'. The reserves held by life offices and pension funds to secure their future contingent liabilities are calculated by actuaries and are correctly described as 'contingency funds' although actuaries do not use such terminology. Actuaries who calculate these reserve funds are described as 'valuators'[74] but this is a most misleading expression because the amounts calculated are not values for the exchange of goods in a

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[67]As the effective discount rate of interest reduces the difference becomes smaller. For a nil discount rate of interest there is no difference at all. Substantial differences can arise with uneven cash flows, eg where allowance is made for major promotions.

[68]See comparative tables in Koch 'Damages' 304 and worked examples 257-91.

[69]Kemp 'Damages' 3ed 103; Newdigate & Honey 'MVA Handbook' 167; Milburn-Pyle & Van der Linde 1974 *TASSA* 292 298; Street 'Damages' 118; Luntz 'Damages' 2ed 281; Davel 'Skadevergoeding' 98-9; Crocker 1980 *TIAA* 517 576; *Snyders v Groenewald* 1966 3 SA 785 (C) 789sup; *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1024G-H; Koch 'Damages' 46-7; Koch 1982/83 *TASSA* 78 87 (note comments by De Bruijn at 107-9 and De Bruijn's use in the *Carstens* matter of a year-by-year approach; Davel op cit 98n602).

[70]At 88.

[71]See paragraph 5.3.2.

[72]This was the example used in *General Accident Insurance v Summers* 1987 3 SA 577 (A) 613-14 to validate a compensation model based on consuming interest and capital.

[73]At 88.

[74]s10 of the Insurance Act 27 of 1943.

market. Strictly speaking the actuary is not a valuator but a financial manager. For a life office or pension fund many lives are involved and statistical averaging gives rise to substantially predictable cash flows. A contingency fund for a single individual does not have the benefit of statistical averaging and requires very different reserving techniques. I will discuss below the concept of an overfunded reversionary trust,[75] a contingency fund appropriate to providing a future contingent cash flow for a single individual.

[5.4.6] Present utility: In relation to a single individual claimant the actuarial year-by-year method with its deductions for risk based on averages is, as I will discuss further below, a tool of utility analysis, the determination of a present financial equivalent for the utility of the life plan which has been lost. It is a price for which the plaintiff foregoes the right to claim further compensation.

[5.4.7] Retirement benefits: The example in table 5[76] assumes that no further income would have been received after age 65. This is generally a false assumption. Many employers today provide pension funds. Those without such benefits must rely on their savings or a state pension or continue working. Statistical conclusions based on the expectation of life can be misleading: Thus for a coloured male aged 40 the expected age at death is 65,3.[77] It would be incorrect to reason that such a man has the expectation of only 0,3 years of retirement.[78] The actuarial year-by-year method reveals that for a coloured male aged 40 now the correct present value of a pension of R5000 per year from age 65 onwards is R12210.[79] The present value of earnings of R10000 per year prior to age 65 is R153014. The total for earnings and pension is then R165224, the pension making a substantial 7,4% of this figure.

[5.4.8] Joint survivorship: A claim for damages by a widow for loss of support requires consideration of the joint survivorship of the breadwinner and the widow.[80] The mortality of healthy children has little financial significance and it is usual to ignore it. The chance that a husband and wife[81] both aged 40 today will both survive to age 65 is the product of the survival chances for each spouse separately. For a white male aged 40 the chance of

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[75]See 108.

[76]At 88.

[77]SALT79/81 coloured males.

[78]As in *Quntana v Union & SWA Insurance* 1976 2 C&B 680 (E) 682 2nd paragraph. In *Reid v SAR&H* 1965 2 SA 181 (D) 190-1 the court incorrectly chose to ignore increased mortality because the expectation of life after reduction still exceeded age 65. When there is increased mortality the chance of death prior to retirement increases and a larger deduction needs to be made for pre-retirement mortality. Crocker 1980 *TIAA* 517 572 observes that 'Knowing the misuse to which life expectancies are prone to be put by lawyers I would be loath to quote a value for the expectation of life without first soliciting information on the use which is to be made of it'.

[79]Using a net capitalization rate of 2,5% per year and the SALT79/81 table for coloureds. Pensions are normally capitalized at a somewhat higher rate of 5,5% per year for the period after retirement.

[80]*Clair v PE Harbour Board* (1886) 5 EDC 311 318; *Hulley v Cox* 1923 AD 234 245. See Davel 'Broodwinner' 522n591 for numerous other instances.

[81]I will refer to husband and wife for sake of convenience. This is intended to include other joint life relationships (father and son; mother and son, etc) where the mortality of the dependant is not negligible. Typically a mongoloid child will be dependent for life but with little prospect for survival beyond age 35.

survival to age 65 is 0,69, ie 69%.[82] For a white female of the same age the chance is 0,83, ie 83%.[83] The chance that they will both survive to age 65 is 0,69x0,83=0,57, ie 57%. The value of dependency during the years up to age 65 would be based on a year-by-year calculation, with the joint survivorship chances substituted in column C of table 5[84] for each possible age 64, 63, 62, etc back to age 40. By adding up these survivorship ratios one obtains the joint expectation of working life. The joint survivorship ratios may be calculated for all possible ages up to when the oldest spouse attains age 99, the limit of life.[85] The sum of these ratios provides the joint expectation of life.[86] The joint expectation of life is always less than the lesser of the individual expectations of life.[87] This is so because the individual survival ratios for one spouse are each reduced by the corresponding survival ratios for the other spouse.[88]

[5.5] CHANCE OF INHERITANCE[89]

[5.5.1] Gross multiplier method:[90] The value of a *spes* of inheritance depends on a number of factors including the survivorship of the wife and the chances of the husband's death. This calculation is best done using the actuarial year-by-year technique.[91] One may, however, obtain a rough approximation as follows: Assume that the husband would have died at the expiry of his expectation of life and discount the expected inheritance sum with interest to present time. A deduction must then be made for the chance that the wife may not have survived to that time together with any other contingencies affecting inheritance prospects.[92] Thus a white male presently aged 40 has an expectation of life of 31 years,[93] an expected age at death of 71 years. The chance that his wife aged 40 will survive until then is 71%.[94]

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[82]SALT79/81 white males.

[83]SALT79/81 white females.

[84]At 88.

[85]After that age the chance of joint survivorship is nil *ex hypothesis*.

[86]See Koch 'Damages' 281 288 for worked examples.

[87]One does find instances where it is incorrectly argued that the wife's mortality should be ignored because women have longer life expectations than men (see, for instance, Davel 'Broodwinner' 363-4; Davel 'Skadevergoeding' 84 123).

[88]A good estimate of the joint expectation of working life may be obtained by calculating for each spouse separately the ratio of the expectation of working life to the period to retirement age for the breadwinner. If these ratios are designated Rm and Rf then the ratio for their joint survivorship is given by RmxRf.

[89]For a discussion of the extent to which compensation may be claimed for loss of inheritance prospects see 330.

[90]For a definition of a 'gross multiplier' see 97.

[91]See Koch 'Damages' 290; see table 21 at 335 for a worked example.

[92]Davel 'Skadevergoeding' 84 123 suggests that if the survivor is older than the deceased and may be expected to die earlier then inheritance prospects should be ignored. Davel here fails to appreciate that the expiry of the expectation of life merely marks the point where survival ratios drop below 50%. She treats such chances as nil (see the pseudo ratios in table 5 column A at 88).

[93]SALT79/81 white males.

[94]The 71 years and the 71% similarity is entirely fortuitous.

An expected inheritance of R100000 implies a present value of R46511[95] before allowance for the wife's mortality and R46511x0,71=R33023 after allowance for her mortality. In practice there would be a further adjustment for general contingencies to allow for the risks of life that affect the accumulation and preservation of capital.[96]

[5.5.2] Actuarial year-by-year method: Apart from being a powerful analytical tool this method provides a more precise value based upon the chance in each year that the husband will die and the chance that his wife will still be alive. For instance during the 12 months following the 60th birthday the chance of death for a white male now aged 40 would be 0,020, ie 2%.[97] The chance that his wife would then still be alive is 89%.[98] The chance that she will inherit in that year is 0,020x0,89=0,0178, ie 1,78%. The present value of inheritance of R100000 in that year is R1780[99] less a discount for interest for 20½ years,[100] giving R1780x0,603=R1073. Using an electronic computer such values are readily assessed for each and every possible 12-month period between ages 40 and 99. The sum of the values gives the value of the *spes* before any deduction for general contingencies.[101] I have calculated this to be R35116 which is 6% higher than the value of R33023 calculated above using gross-multiplier reasoning.

[5.5.3] Retirement lump sums: The gross multiplier approach to inheritance prospects does not yield very good results when the breadwinner will only acquire possession of the asset in years to come. Perhaps the most common example of this is the accrual of a substantial retirement lump sum to civil servants at age 65. Consider the prospect of a lump sum retirement gratuity of R100000 for a coloured male presently age 40. This will only be available for inheritance after age 65. The gross multiplier approach would place on this the same value of R33023 as if the breadwinner had taken immediate possession. The year-by-year approach indicates a nil value for the *spes* in each year prior to age 65 and gives a total value for the *spes* on death after age 65 of R15450. Such deferred inheritance prospects are also to be found under trust funds and with aged parents. The year-by-year calculation can be readily extended to cover complicated death and survival contingencies involving 3 and more lives and a variety of different sequences for the occurrence of the deaths.[102]

[5.5.4] Awards of damages: In the next chapter I will discuss the concept of consuming

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[95]Discounting at a net capitalization rate of 2,5% per year compound.

[96]See footnote 455 at 336.

[97]SALT79/81 white males: (73231-71386)/91723.

[98]SALT79/81 white females: (85445+84361)/2/95760 (allows for her survival to mid-year).

[99]R100000x1,78/100.

[100]At 2,5% per year compound.

[101]See footnote 91.

[102]There was time when life offices would buy the contingent rights of beneficiaries to income or capital from trust funds. The valuation considerations formed a part of the syllabus for trainee actuaries (Benz & Tappenden 'Reversions & Life Interests'; see too Hooker & Longley-Cook 'Life Contingencies' vol 1 87-109; Neill 'Life Contingencies' 249-80).

interest and capital over the expectation of life of an injured claimant. This concept takes as its premise that the claimant will as a matter of certainty live until the expiry of his expectation of life at which point in time the entire damages award will have been consumed. In terms of this model the heirs have a nil prospect of inheritance because the chance of death prior to expiry of the expectation of life has been assumed to be nil. However, if one considers the year-by-year use of the value of the chance of death one finds a substantial value for the prospect of inheritance. This is so because the chance of early death prior to expiry of the expectation of life is in fact close to 50%. It will take many years to consume the capital but in each of those years there is a very real chance of early death. If one assumes that the award of R100000 will be consumed in accordance with model B under table 6[103] then for a coloured male aged 40 the value of the chance that his wife, also aged 40, will inherit before he attains age 60 is R20251,[104] that is to say 13% of the original capital awarded.

It is clear that because of the risk of early death the heirs of the claimant acquire the expectation of a substantial inheritance regardless of what amount the court chooses to award.

Another important conclusion is that the possession of substantial capital provides financial security for the family of a breadwinner claimant in the event of his early death. For this reason he no longer needs the life insurance and widow's pension benefits that may otherwise have been provided by his employer. The value of such death benefits should thus, in many instances, be omitted from any compensation awarded.[105]

[5.6] LAW OF LARGE NUMBERS

[5.6.1] Frequency predictions: When an actuary does his reserving for a life office or pension fund he establishes contingency funds[106] on the basis of life-table averages. This is appropriate in the circumstances because life offices and pension funds have numerous members. The statistical law of large numbers[107] tells us that under such conditions averages provide good predictors of what will happen in the future. For this reason the actuary can predict with considerable accuracy for a life office the number of deaths which will occur during the coming years. The law of large numbers provides not only accuracy but also a measure of the likely size of errors.[108]

[5.6.2] Consuming interest and capital: The actuary manages the life office and pension fund financial reserves by thinking in terms of groups of claims. His statistical tables tell him that out of 1000 policyholders 5%, ie 50, will claim accident benefits of R1000 each in 10 years' time. The total liability of the life office in that year will be 50xR1000, ie R50000. The actuary can invest fairly accurately to meet this liability. A single individual

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[103]See 100.

[104]SALT79/81 coloured mortality.

[105]See 60.

[106]See 106.

[107]The 'central limit theorem' (Levin 'Statistics for Management' 2ed 262-3).

[108]By way of the standard deviation and other such measures.

equipped with 5% of R1000, the value of the chance, has no hope of benefiting unless he takes advantage of the law of large numbers and uses his R50, 5% of R1000, to buy suitable insurance.[109] He loses the use of his premium but gains the advantage of knowing that his expense will be met if it arises.

[5.6.3] Cross subsidies: When working with large numbers the notion of consuming interest and capital is a valid financial model because those who die early provide the funds for those who live long. The effect of this cross subsidy is that the reserve for a portfolio of life annuitants does not run down over the original expectations of life but is continually extended to take account of the 'end-of-a-rainbow' phenomenon,[110] the Bayesian reassessment of the risk.[111]

[5.6.4] Individuals and utility: Statistical prediction tells us what proportion of a group will suffer loss but it cannot tell which members of the group will suffer.[112] The power of an average as a predictor is at its absolute worst when applied to a single individual. In fact it is no predictor at all and it would be an abuse of the information to use it in the sense of a predictor.[113] What the average does indicate to us is the present marginal utility of an uncertain future event. It is the decision criterion, the point at which in the mind of a reasonable person the prospect of gain balances the prospect of loss.[114]

[5.6.5] Classical statisticians: Actuarial explanations for lump-sum once-and-for-all awards to individuals are generally unsatisfactory.[115] The wording of many actuarial reports describing damages calculations contemplates a one-man pension fund but fails to explain the relevance of averages and the funding of longevity when there is no cross subsidy with those who die early. Typical of such inappropriate explanations is the large-numbers model used by Prevett:[116]

> 'If there had been a very large number of similar individuals of the same age all receiving the same amount, then overall they would have equated to the stated payments, allowing for the operation in due time of compound interest and mortality... if this very large number of individuals made a pool investment of the total of the identical amounts awarded... and if each received from the pool for the remainder of his lifetime the annual loss for which he had been compensated by

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[109]In practice insurance premiums also include allowance for administration expenses and discounts for interest.

[110]Kemp 'Damages' 3ed 103 'by recourse to both interest and... capital, then the total investment would be exhausted on the death of the last survivor'.

[111]Bayesian reassessments are familiar to jurists in the sense of more accurately assessing the loss in the light of events supervening between date of delict and date of trial (eg *Wigham v British Traders Insurance* 1963 3 SA 151 (W) 156C).

[112]Van Rensburg *Huldigingsbundel Daniël Pont* 384 390-1.

[113]Crocker 1980 *TIAA* 517 572 'Knowing the misuse to which life expectancies are prone to be put by lawyers...'.

[114]See 5 et seq for further discussion of 'utility'.

[115]See hypothetical discussion between judge and actuary quoted at 86.

[116]Kemp 'Damages' 3ed 103. I have rearranged some of the phrases for ease of reading.

> recourse to both interest and (to the extent necessary) capital, then the total investment would be exhausted on the death of the last survivor'.

The picture we have here is that actuaries apply familiar procedures (ie law of large numbers with cross subsidy) in an unfamiliar context (ie no large numbers, no pooling of experience). These actuarial explanations brand the actuaries as classical statisticians in the sense that chance ('probability' in the statistician's sense) is interpreted as a frequency ratio. In relation to a single individual claimant we need, however, to fall back on very much more intuitive notions of chance.

[5.7] CONCLUSIONS

The standard actuarial calculation proceeds on the basis of the year-by-year application of value of a chance, each year being separately discounted for the risk of early death. The lump-sum present value is the sum of the separate values of a chance and is itself no more than the value of the overall chance. Restitution in the sense of reproducing the lost income is only possible when the risks are very small, as may arise with the dependency of a child. It is otherwise unsound to speak of reproducing the lost income by consuming interest and capital. The use of life annuities for this purpose is generally resisted due to the absence of suitable contracts.[117]

A focus on the value of the separate chances of life and death permits solutions to complex problems involving retirement benefits and inheritances. Actuaries are specially trained to handle the complex arithmetic of life-table chances.

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[117]See 118.

CHAPTER 6

CONSUMING INTEREST AND CAPITAL

Summary: *A compensation model based upon consuming interest and capital it is a useful concept provided its limitations are borne in mind. Conditions of high inflation dictate that there is a 'ballooning' of the original capital for many years before inroads into accumulated funds begin to be made. To test the consumable income from investing an award a court should ignore high nominal rates of return and look to rates closer to the real rate of return. The prudent investor will save for a retirement that extends well beyond the expiry of the expectation of life. The impact of tax on interest receipts is aggravated by high rates of inflation and renders such investments unattractive compared to growth investments such as shares and immovable property.*

[6.1] DEFINITIONS

In this chapter I examine some basic capitalization concepts which will be developed further under the chapter on the time value of money.[1]

[6.1.1] Multipliers: Much has been made of the proposition that:

> 'When one is asked to assess a claim based upon an estimated loss of future earnings one is really required to arrive at such a sum presently payable as will give to a plaintiff a periodic payment, and the figure arrived at should be such that at the end of the period there would be no capital sum left'.[2]

There is a regular payment, a period over which it is payable and a rate of interest. The resulting sum is adjusted for 'general contingencies'. Boberg[3] has aptly described this as the 'gross multiplier method'. A 'multiplier' is a period which has been reduced for risks and by a discount for interest. A 'gross multiplier' has been reduced for interest and the contingency of early death but not for general contingencies.

In England the multipliers used by the courts include discounts not only for early death and interest but also for general contingencies and are for this reason described by Boberg as 'net multipliers'.[4] The English net multipliers are determined on a 'gut feel' basis coupled with

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[1]See 125 et seq.

[2]*Gillbanks v Sigournay* 1959 2 SA 11 (N) 15A.

[3]Boberg 1964 *SALJ* 194 204-5.

[4]Boberg 1964 *SALJ* 194 204-5.

regard for the multipliers used for previous awards.[5] Actuarial evidence as regards the value for a multiplier will not be tolerated by the English courts because it is felt to introduce a misplaced impression of certainty.[6] Such fears may be appropriate when dealing with a jury but of dubious relevance when dealing with a highly educated judge.

A multiplier is expressed as a number of years regardless of what discounts have been applied. For this reason it is readily confused with a pure period of time unadjusted for risk. Thus, for example, if the normal retirement age is 65 years then for a man now aged 40 years the period of working life is 25 years. If allowance is made for early death the expected duration of working life reduces to 19,884 years.[7] If a discount for a net capitalization rate of 2,5% per year compound is then applied this reduces to 15,782 years. This duration, reduced for the discounts of risk and interest, is best described as a 'multiplier' and not a period. The expectation of life includes a discount for early death and is thus not a true period but a rather a gross multiplier based on a nil discount rate of interest.

If the risk of death were to be wished away then the period of survival becomes infinity. For a mortal person the chances of survival beyond age 99 so small that the period may for practical purposes be terminated at age 99. For corporations with perpetual succession the mortality risk is eliminated and damages calculations should then be based on a perpetuity for which the relevant multiplier is calculated as the reciprocal of the discount rate of interest.[8]

A multiplier is but one example of a larger class of risk-adjusted measures generally known as expected values or 'point estimates' which have been dealt with under the general discussion of utility.[9]

[6.1.2] The actuarial year-by-year method: This involves the year-by-year application of the principle of valuation of a chance:

> 'In calculating the loss of future income, the actuaries discounted each year's loss to allow for the probability that Clive would not have been alive to earn the income'.[10]

This method gives the most accurate present lump-sum value for a risk-adjusted series of payments.

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[5]See, for instance, *Lim Poh Choo v C&IAHA* [1979] 1 All ER 332 (CA) (HL) 343h-j.

[6]Owen & Shier 1985 *JIASS* 'The actuary in damages cases'.

[7]See table 5 at 88.

[8]Thus for a discount rate of interest of 2,5% per year the multiplier for a perpetuity is 1/0,025 = 40 years.

[9]See 15.

[10]*Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1024G-H. The word 'probability' here clearly refers to the chance of survival the chance of death in each year being a possibility of less than 50%. For a calculated example see table 5 at 88.

[6.1.3] Approximations: It has been noted in the previous chapter that the 'gross multiplier' method provides a short-cut means for estimating the result of a year-by-year calculation.[11] The gross multiplier method gives fairly good results with simple cash flows but fails badly for more complicated situations.[12] The notion of consuming interest and capital over a fixed period is a useful aid to solving problems in discounting provided it is not slavishly adhered to and is seen in its proper perspective as an aid to thought. Flat maps provide useful guidance to navigating on a spherical earth. This does not mean that the earth is flat. By the same token use of the gross multiplier method as an aid to assessing damages does not mean that the claimant can then reproduce his future lost earnings by consuming interest and capital.[13]

[6.1.4] Interest and inflation: Under conditions of inflation the regular payment is assumed to increase over the years, usually in line with inflation. The expected rate of return on investments is itself inflated as investors demand a real rate of return over and above the rate of reduction in the buying power of their capital. The *nominal rate of investment return* 'I' offered to investors thus comprises an inflation component 'F' and a real rate of return 'R' with I=R+F. However, when inflation rates are high then one must work with the more accurate formula:

$$1+I/100=(1+F/100)x(1+R/100)$$

Thus, for example, a rate of 16% per year comprises a real element of, say, 2,5% per year and an inflation element of 13,2% per year (1,16=1,132x1,025).

[6.1.5] Sinking funds: The notion of a sinking fund[14] is familiar to all persons who have taken out a mortgage bond on their home. There is a regular payment, a period and a rate of interest. If the interest rate remains unchanged and the payments are regularly made then at the end of the period the original debt will have been extinguished. It is against this background that the notion of consuming interest and capital would seem to have developed. With the advent since 1970 of relatively high rates of inflation[15] the identity between home loans and the compensation model of consuming interest and capital has become less and less apt. Under home loans the repayments are not regularly adjusted upwards to allow for inflation whereas compensation calculations take account of escalating payments.[16] The financial effect of this difference is illustrated in table 6[17] by modelling the outstanding capital in each year for a 20-year period. The calculation has been done using 3 different

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[11]See comparative values in Koch 'Damages' 304 257-91.

[12]Typically promotions and retirement benefits.

[13]See *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 838-9 for an example of misplaced 'flat-earth' reasoning.

[14]Donald 'Compound Interest' 82-3; Brigham 'Financial Management' 489-92.

[15]See tables in Koch 'Damages' 294; Corbett & Buchanan 3ed 105.

[16]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 115-16.

[17]At 100.

financial models:[18]

TABLE 6 - 20-YEAR SINKING FUND MODELS

Yr	Model A D=2,5%pye Payment Rpy	Model A E=0%py Capital R	Model B D=16%py Payment Rpy	Model B E=13,2%py Capital R	Model C D=16%py Payment Rpy	Model C E=0%py Capital R	Yr
1	10000	159788	10000	159788	23234	159788	1
2	10000	153533	11317	173754	23234	158403	2
3	10000	147121	12808	188427	23234	156796	3
4	10000	140549	14495	203718	23234	154932	4
5	10000	133813	16404	219499	23234	152770	5
6	10000	126908	18565	235590	23234	150262	6
7	10000	119831	21010	251749	23234	147352	7
8	10000	112577	23777	267657	23234	143977	8
9	10000	105141	26909	282901	23234	140062	9
10	10000	97520	30453	296951	23234	135520	10
11	10000	89708	34464	309138	23234	130252	11
12	10000	81701	39003	318622	23234	124141	12
13	10000	73494	44140	324358	23234	117052	13
14	10000	65081	49954	325053	23234	108829	14
15	10000	56458	56533	319115	23234	99290	15
16	10000	47619	63979	304595	23234	88225	16
17	10000	38559	72406	279115	23234	75390	17
18	10000	29273	81942	239782	23234	60501	18
19	10000	19755	92734	183094	23234	43230	19
20	10000	10000	104818	104818	23234	23234	20
21		0		0		0	21

Model A: A fixed unvarying payment of R10000 per year discounted at a rate of 2,5% per year compound.

Model B: An increasing payment which commences at R10000 per year and which is increased at the end of each year by 13,2% per year compound. Discounting has been done at a nominal rate of 16% per year compound, that is to say an effective net capitalization rate of 2,5% per year compound has been used.

Model C: A fixed unvarying payment of R23234 per year discounted at a rate of 16% per year compound. The repayment of R23234 per year has been selected to give the same initial capital for all 3 models. This model reflects the repayment of a typical home loan.

Note that for all models payment has been assumed to be made in advance, at the beginning of each year. The outstanding capital balances shown in the table reflect the balance at the beginning of each year immediately before the payment for that year is made. D is the discount rate of return. E is the rate of escalation applied to the payments. Due to rounding errors the figures in row 20 do not exactly match the values indicated by calculations applied to row 19.

[18]Just as one may model an aeroplane or ship or building so too may one construct logical models (these days usually on computer) to provide guidance as to the nature of financial events (Fama 'Finance' 11-12; Brigham 'Financial Management' 80n2).

[6.1.6] Discussion of model A: This model in table 6 shows the reducing of capital under a sinking fund scheme at a rate of 2,5% per year.[19] It will be noted that the calculation requires yearly payments that ostensibly do not increase over the years. This does not mean to say that such payments will not be increased but it does emphasise that for purposes of the calculation the increases are ignored. In England this is known as the 'Diplock approach':

> 'In estimating the amount of the annual dependency in the future, had the deceased not been killed, money should be treated as retaining its value at the date of the judgment, and in calculating the present value of annual payments which would have been received in future years, interest rates appropriate to times of stable currency such as 4% to 5% should be adopted'.[20]

[6.1.7] Discussion of model B: This model in table 6 shows the effect of making explicit allowance for inflation in conjunction with a high nominal rate of interest.[21] The initial capital sum is the same under both models A and B, as too is the net capitalization rate of 2,5% per year compound. For model A the net capitalization rate is introduced explicitly while under model B it is introduced implicitly by the difference between 16% per year and 13,2% per year.[22] Under model A the notional capital balance reduces steadily from its initial value to nil at the end of 20 years.[23] Under model B the initial interest receipts exceed the required payments. The excess interest is capitalized and the capital balance **increases** over the years. It is only in the 14th year that the payments increased for inflation overtake the interest receipts and then rapidly consume interest and capital to nil during the last seven years. This is a very different cash flow from that pictured by analogy with the simple home loan. The expression '**balloon effect**' aptly describes this swelling of the capital that is required to meet inflation-adjusted payments in the distant future.

In *Bailey*'s case[24] the appellate division approved the actuarial practice of making explicit separate allowance for inflation. In doing so it did not emphasise that such an allowance is appropriate only in conjunction with a high nominal discount rate of interest.[25] This was unfortunate because the need to use a correspondingly high nominal discount rate is not always obvious to those untrained in financial mathematics.

[6.1.8] Discussion of model C: This model in table 6 has been included to show a comparable capital reduction pattern for a modern home loan based on high rates of interest. It deserves note that notwithstanding the very high repayments (R23234 per year compared to R10000 per year) the rate of capital redemption is very much slower than under a home

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[19]Nominal rates were at this level for a while after the 2nd world war (see table in Koch 'Damages' 297).

[20]Following *Mallet v McMonagle* [1969] 2 All ER 178 (HL) 190H-I.

[21]This should not be confused with the standard actuarial year-by-year technique which not only makes explicit allowance for interest and inflation but also allows for the risk of mortality on a yearly basis.

[22]By rearranging formula 1 above we have the calculation 1,025=1,16/1,132.

[23]Strictly speaking at the beginning of the 19th year. This example reflects payments in advance.

[24]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 115-16.

[25]See paragraphs 6.1.4 and 8.1.7.

loan at 2,5% per year. In other words **higher bond rates not only mean additional interest on the current outstanding balance but also a more substantial and prolonged state of indebtedness.** This consideration is important when placing a value upon bond subsidies provided by an employer. Consider a bond subsidy[26] of R13234 per year (R23234 less R10000) towards repayment of a loan at commercial rates of 16% per year.[27] This apparently has the same value as an employment benefit as a bond at a low rate of 2,5% per year.[28] However, the rate of capital redemption is much faster for the bond at a low rate of interest. The employee who wishes to repay the bond prior to full term is at an advantage if he has the benefit of a low-interest bond. One might say that a subsidy by way of a low rate of interest has the higher utility. In practice the capital repayment advantage of a low interest rate is often offset by the granting of extremely long repayment periods.

[6.2] CONSUMABLE INVESTMENT INCOME

[6.2.1] Preservation of capital: In an utopian economy with a nil rate of inflation an investor may consume all interest earned on his money and at the end of the day have capital with a constant and unchanged buying power. Under conditions of inflation the investor who wishes to preserve his capital will capitalize that portion of his investment income which is needed to maintain the buying power of his capital and restrict his consumption to the net real rate of return. The real rate of return may then be consumed with equanimity in the knowledge that as long as the buying power of the capital is maintained the buying power of the real rate of return derived from such capital will also be maintained. For some people such a scheme may well have attractions, a utility superior to that of any other investment strategy. The capitalization of investment returns would usually be achieved through investments offering substantial capital growth, such as mutual fund units, immovable property and life insurance plans.

[6.2.2] Retirement funding: However, most persons will take the view that life does not go on forever. For them it is attractive to consume more than the real rate of return. The buying power of their capital will then diminish despite substantial 'ballooning' in nominal terms. If they plan to consume all their capital over the expectation of life they are faced with a 50% chance of living out old age with no money at all. For this reason the prudent investor will reduce expenditure and target for adequate capital well into old age. Although income may only accrue up to say age 65, living expenses will continue long beyond that age. It would be foolish indeed to follow judicial directives about consuming interest and capital over the expected term.[29] Firstly part of the capital should be retained as provision for a retirement. Secondly substantial 'ballooning' of capital is necessary, that is to say plough back of investment returns, if the income to be drawn from the capital is to increase adequately in years to come.

One does find instances a court teste the adequacy of an award by reference to the income

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[26]One that remains constant in rand terms, that is to say is not escalated for inflation.

[27]This is typical of the bond subsidies provided to civil servants and teachers.

[28]Such as are commonly provided to the employees of banks and insurance companies. Compare models A and C under table 6 above.

[29]See, for instance, *Gillbanks v Sigournay* 1959 2 SA 11 (N) 15A.

which can be derived from investing that award.[30] Such cases as there are have tended to focus upon a high nominal rate of interest. This is clearly incorrect for it fails to have regard to the considerations described above. A suitable testing rate would be above a real rate of return of about 2,5% per year, but much less than the nominal rate of, say, 16% per year. The precise level to be used should have regard to the desired level of living expenses and the extent to which provision is to be made for old age, including above-average longevity.

[6.3] TAXATION

[6.3.1] Taxable and tax-free investments: Some forms of investment income, particularly interest payments, are subject to taxation.[31] For this reason the net rate of return obtainable by a plaintiff on his award may be less than the full nominal market rate. The courts require that the discount rate of interest be determined by reference to an investment return net of taxation.[32] In South Africa this has, for various reasons, proved to be an impractical directive given lip service but little financial application. Not the least reason being that there substantial opportunities for avoiding tax on investment returns. In practice the discount rate is with few exceptions determined without regard for the particular tax circumstances or investment abilities of the plaintiff. More of this later.[33] For the moment let us consider the effect of taxation on a sinking fund of the sort illustrated in table 6, model B with the 'ballooning' of capital.[34]

[6.3.2] Estimating future tax rates: Before performing calculations we need to identify some basis on which to estimate future tax rates. The usual approach used in South Africa[35] and in England[36] is to assume that current tax rates will be maintained in real terms, ie the proportion of a man's earnings paid by way of tax will remain constant in time if his gross earnings are adjusted over the years in line with inflation.[37] For present purposes I have used the tax tables applicable to the tax year 1989/90 for married persons with no dependants.

In order to assess the effect of income tax on investment income not only is an assumption as to future tax rates required but also an assumption as to the extent to which investment

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[30] *Kloppers v Rondalia Assurance* 1972 2 C&B 289 (W) 296 (injury claim); *Waring & Gillow Ltd v Sherborne* 1904 TS 340 350 (claim by dependants).

[31] Capital gains are presently tax free providing the investor does not actively trade his investments.

[32] *Oberholzer v Santam Insurance* 1970 1 SA 337 (N) 342E; *Pitt v Economic Insurance* 1957 3 SA 284 (D) 287sup; *Dorfling v Bazeley* 1961 1 C&B 128 (E) 132inf; *Sigournay v Gillbanks* 1960 2 SA 552 (A) 568. See too footnote 44.

[33] See 140.

[34] See 100.

[35] Milburn-Pyle & Van der Linde 1974 *TASSA* 292 305-6.

[36] In *BTC v Gourley* [1955] 3 All ER 796 (HL) 806H 'No one can foresee whether tax will go up or down, and I advise you not to speculate on the subject but to deal with it as matters are at present'. The English multiplier system is based on model A in table 6 above, ie no explicit allowance for inflation in the calculation. This has the same financial effect as assuming that tax rates will be adjusted in future in line with inflation. See too Boberg 'Delict' 543 who describes the Gourley approach as the one generally favoured by commentators.

[37] There are minor variations on this basic approach which need not concern us here.

income will be taxable. A few investments provide tax-free interest, but at rates that are generally too low to deserve serious consideration.[38] Growth investments produce tax-free capital growth plus largely tax free dividends, or rents which are taxed on the excess over expenses. There are numerous interest-bearing investments providing taxable interest, the first R2000 being tax free.[39] For illustrative purposes I have in table 7 worked with three models all based on an income of R30000 per year net after tax.[40]

[6.3.3] Effect of tax on present value: When provision is made under model D for tax on a real rate of return the additional capital required is a negligible 0,1%, one thousandth of R479334. When provision is made for tax on interest earnings under model E the additional capital required is 23% of R479334. A substantial reduction in present value can thus be achieved merely by adopting a sensible investment strategy. Can a plaintiff be required to mitigate his damages by choosing a growth investment strategy (model D)? I will return to this topic later.[41]

An alternative approach to taxation is to ignore its effect both on the earnings which have been lost and the interest income which will now accrue.[42] A net-of-tax income of R30000 per year implies gross earnings of roughly R39000 per year. Taxation on the salary earnings is then 23% of R30000. The additional capital required to offset the tax on the interest income per model E is 23% of the capital required under model B. Tax on earnings and tax on interest thus largely cancel one another out. The offset works quite well but, as I shall now demonstrate, only at this level of earnings.

For yearly salary earnings of R10000 tax liability is negligible but the add-on for tax on interest is 7,7%. The offset thus does not work so well at this low level of income.

Yearly earnings of R90000 net of tax require a before-tax income of roughly R145000. Tax in this instance is 61% of the net income. This is substantially in excess of the 33% needed to offset tax on interest income.

The above calculations reveal that it is not generally valid to assume that the present value of tax on notional expected earnings can be equated to the tax on notional expected interest income.

A substantial increase to the damages for tax on interest income is only justified if heavily taxed fixed-interest investments are the only investment medium available to the claimant. In practice in times of high inflation the prudent investor may be expected to seek growth

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[38]See table in Koch 'Damages' 296.

[39]In terms of tax legislation for the 1992/93 tax year (ss10(1)(i)(xv) and (xvi) of Income Tax Act 58 of 1962 (as amended).

[40]Roughly R39000 per year before tax for a single person in the 1989/90 tax year.

[41]See 125.

[42]*Sigournay v Gillbanks* 1960 2 SA 552 (A) 568.

TABLE 7 - TAXED SINKING FUNDS

Yr	Model B 0% taxable Net yield = 16%py Payment Rpy	Capital R	Model D 2,5%py taxable Net Yield = 15,95%py Payment Rpy	Capital R	Model E 16%py taxable Net Yield = 11,50%py Payment Rpy	Capital R	Yr
1	30000	479334	30000	480020	30000	693350	1
2	33951	521227	33951	521698	33951	731714	2
3	38422	565240	38422	565528	38422	770472	3
4	43482	611109	43482	611252	43482	809264	4
5	49209	658447	49209	658492	49209	847650	5
6	55690	706716	55690	706718	55690	885054	6
7	63024	755190	63024	755192	63024	920734	7
8	71324	802913	71324	802915	71324	953766	8
9	80717	848643	80717	848646	80717	983088	9
10	91347	890794	91347	890798	91347	1007335	10
11	103377	927359	103377	927363	103377	1024953	11
12	116992	955819	116992	955824	116992	1034030	12
13	132400	973039	132400	973045	132400	1032435	13
14	149837	975141	149837	975148	149837	1016741	14
15	169571	957353	169571	957361	169571	983446	15
16	191904	913827	191904	913836	191904	927396	16
17	217178	837431	217178	837441	217178	842216	17
18	245780	719493	245780	719505	245780	719815	18
19	278149	549507	278149	549521	278149	549469	19
20	314781	314781	314781	314781	314781	314781	20
21		0		0		0	21

Model D: Investment in growth assets which provide tax-free capital growth of 13,2% per year plus a fully taxable real rate of return of 2,5% per year.

Model E: Investment in interest bearing investments the income from which is fully taxable. A taxable rate of return of 16% per year has been assumed.

Model B: As illustrated in table 6 at 100 above. This model assumes a tax-free rate of return of 16% per year.

For each model a net yield has been calculated, this being the internal rate of return (see 128 below) needed to relate the original capital to the actual net payments expected. The tax table for the 1989/90 tax year for married persons has been used.

investments which yield tax-free capital growth.[43]

[6.3.4] Net capitalization rates: Under model B in table 7 above the discount rate of interest which gives a result equal to the initial capital sum is 16% per year. Under model D the rate

[43]See 139.

is 15,95% per year, only marginally different. Under model E the rate required to produce the capital sum of R693350 is 11,50% per year. The rate of inflation is 13,2%. This implies a net capitalization rate of *minus* 1,5% per year to allow for tax on investment income.[44]

[6.4] CONTINGENCY FUNDS

The discussion thus far has focused on a gross multiplier obtained by discounting over the expectation of life, or working life, or joint life. We now examine an alternative financial device, the contingency fund. This enables an individual to provide for uncertain past or future financial contingencies without resorting to the purchase of a life annuity.[45]

[6.4.1] Definition: I use the expression 'contingency fund' to describe a fund established to provide for the income and outgo of uncertain future events. The degree of uncertainty may vary quite widely. Thus, for instance, an accountant may set up a provision for taxation, a contingency fund to cover the tax liability of a company pending final assessment by the revenue authorities. A major actuarial responsibility is the determination of proper reserves, contingency funds, to ensure that life offices and pension funds will be able to meet their future contingent liabilities under life policies as and when these arise. Boberg states that 'besides granting regular maintenance the court may order the creation of a "contingency fund" to provide for expenses of an extraordinary nature connected with a child's health'.[46] I use the expression 'contingency fund' to embrace the entire fund set aside and not just the additional amount referred to by Boberg. The most important characteristics of a contingency fund are:

* The prospect of making an uncertain payment or payments at some future time. The uncertainty may relate to the size of the payment or whether or not it will be made at all.
* The prospect of a reversion to the original provider of any surplus remaining in the fund once it has fulfilled its purpose.
* The prospect that the provider may have to make further payments to meet excess liabilities.[47]

I will now examine in greater detail three examples of contingency funds:

[6.4.2] Provision for taxation: A contingency fund set up by an accountant for a trading company is concerned with an open-ended liability by the company for errors in its estimate of tax liability. If the contingency fund proves inadequate the company will have to make

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[44]1,0152=1,132/1,115. See 145 for discussion of net capitalization rates. Pearson (Cmnd 7054 1978) in England recommends (vol 1 147 table II) net capitalization rates of +1% 0% -1,5% -2% per year depending on the level of earnings lost; by way of contrast the official actuarial tables issued by the Government Actuary in England (1984) make allowance for positive real rates of return only of 1,5% to 5% per year.

[45]See 113.

[46]Boberg 'Persons & family' 288.

[47]As a general rule there is always some limitation to the liability of the provider. A company generally has limited liability. The courts will lay down limits of liability (*In re Estate Visser* 1948 3 SA 1129 (C) 1139 (£1000)).

additional payments. Such additional payments may cause financial embarrassment. An excessive provision may unduly inhibit dividend payments and perceptions of the enterprise's ability to accept profitable business risks.[48] The accountant can be expected to make a reasonably accurate provision, neither too large nor too small.

[6.4.3] Reserves of a life office: These are calculated by actuaries with considerable accuracy using past statistical experience as a guide to the future claims and premium payments of a large number of policyholders. It is well known that deviations from the averages do occur and life offices normally retain an 'estate', an additional contingency fund which ensures financial stability even in extreme circumstances.[49] The liability is open-ended. If the reserves prove inadequate the estate, the contingency fund in Boberg's sense, must bear the burden. If the reserves prove more than adequate the estate will be swelled and there will be profit distributions to with-profit policyholders, and to shareholders, if any. If reserves are too large this can affect the competitive position in the market due to inadequate profit distributions to policyholders. If the reserves are too small there is a risk of insolvency due to adverse fluctuations. The art and science of the actuary is the determination of accurate reserves, neither too large nor too small.

[6.4.4] Support from a deceased estate: If a breadwinner dies under circumstances which do not give rise to an action for damages by his dependants then his dependent child has the right to claim support from his estate. This is not a claim for damages but a new compensating duty of support which comes into being after the death. This claim interacts with the claim for damages,[50] and, due to its superficial resemblance to a damages claim, needs to be discussed in the present thesis, quite apart from its relevance as an example of a contingency fund.

Unlike the defendant in a damages claim the estate of the deceased is not bound to provide the same level of support as was enjoyed by the dependants prior to the death. It is only bound to provide what it can afford.[51] The interests of the heirs will not be ignored.[52] For this reason one may anticipate that the courts will place reasonable limits upon the funds available from a deceased estate for the provision of support.[53] A second important difference from damages claims is that the money set aside serves as a provision, a contingency fund to ensure payment of the required maintenance. If the child suffers an early death the balance remaining in the contingency fund, unless otherwise agreed, is

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[48]See, for example, the risk-management techniques described in *The Economist* April 10-16 1993 16-20.

[49]With-profit policies have further flexibility due to the removal of some contractual guarantees. The profits earned on the estate are generally distributed to with-profit policyholders, or used to pay dividends to shareholders who provided the surplus funds in the first place.

[50]See 285.

[51]Boberg 'Persons & family' 288n40.

[52]*Couper v Flynn* 1975 1 SA 778 (R) 780A.

[53]Boberg 'Persons & family' 288n41.

repayable to the estate.[54] If the contingency fund is depleted while the child is still dependent then the child may seek further funds from the heirs to the estate. The prodigal son who wastes the money given to him for his support may always return and demand to be supported.[55] It is conceivable that such a claim may be brought against the heirs after an estate has been wound up.

[6.5] FUNDING CRITERIA

[6.5.1] 50% risk of ruin: The ideal funding level for a contingency fund is that which ensures sufficient money no matter what happens. Such absolute protection requires inordinately large amounts of money. In practice financial resources are limited to a greater or lesser degree and some risk must be accepted. The big question is 'How much risk'. The major issue in this text is the provision of sufficient funds for an injured plaintiff or a needy widow.[56] The expectation of life provides an indication of the age up to which 50% will survive from a group of persons now living of the same age and sex. An accountant whose tax provisions were inadequate 50% of the time would probably lose his job. The same applies to an actuary. Therefore if a meaningful contingency fund is set up the expectation of life should not be used as a funding criterion. Something better is needed. The purchase of a life annuity is one option, but not without problems.[57] Another option, which we now examine more closely, is for the victim to retain control of the capital, but with funding based on a risk of inadequate funds of less than 50%:

[6.5.2] Deciles & quartiles: We could fund on the basis of survival to age 99, the limit of life. There are, however, intermediate funding levels with definable levels of risk, the median, quartile and decile ages. For a white woman now aged 40 these ages are illustrated in table 8 above.[58] The median is the age at which exactly 50% of such women alive now are expected to die. The quartile reflects the age at which 25% are still alive, a 25% risk of inadequacy, the decile a 10% inadequacy risk. The contingency fund is calculated to provide R10000 per year escalating in line with inflation over the relevant period.[59] It is entirely valid in this context to speak of consuming interest and capital subject to the 'balloon' phenomenon that arises with escalating payments. The main point to be observed in able 8 is that lower the risk of running out of money, the larger is the contingency fund required.

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[54]Contra Bouwer 'Bestorwe Boedels' 318 'Die voog en eksekuteur kan in 'n gegewe geval ooreenkom dat die minderjarige se eis vir toekomstige onderhoud gedelg word met 'n enkele uitbetaling in volle en finale vereffening van die eis. Die minderjarige word dan reghebbende t.o.v. die geld. As hy die dag mondig is, word die ongebruikte gedeelte daarvan aan hom uitbetaal. Sterf hy voor mondigwording, is dit deel van sy boedel wat onder sy erfgename vererf'. The master's office in Natal does not follow Bouwer. For practical purposes the wording of the relevant agreement or court order will be decisive. The heirs do, it seems, have the right to demand that a reversion clause be included in the agreement.

[55]Voet 25.3.5; *Schierhout v Union Government* 1926 AD 286 291; *Cross v Cross* 1922 EDL 224 232; *Greathead v Greathead* 1946 TPD 404 411.

[56]I shall ignore for present purposes the dependent child, for whom considerations of utility values and contingency criteria tend to lead to very much the same amounts.

[57]See 113.

[58]SALT79/81 white females.

[59]Using a net capitalization rate of 2,5% per year.

TABLE 8 - CONTINGENCY FUNDING CRITERIA

Measure	Risk %	Expiry age (years)	Contingency reserve R	%ge increase
Expected age at death	56%	76,75	242000	-
Median	50%	78,79	250000	3%
Quartile	25%	85,86	275000	14%
Decile	10%	90,86	290000	20%
One percentile	1%	98,81	310000	28%

SALT79/81 white female mortality.

[6.5.3] Even-handed justice: The is one major objection to using a contingency fund to compensate a plaintiff is the need to be equally as fair to the defendant who provides the money. If the plaintiff dies while funds still remain then these funds should revert to the defendant.[60] By reason of this reversionary interest the defendant could quite reasonably demand that the funds be placed in trust and that there be some modest financial reporting. There would also need to be stipulated restrictions as to the use which can be made of the money lest it be dissipated on luxuries and other expenditure for which the defendant could not reasonably be held liable. The potential administrative complications make it clear that a defendant is better off paying compensation by instalments and thereby retaining possession of the funds.[61]

[6.5.4] Unfettered use of compensation money: The lump-sum once-and-for-all rule has a corollary which states that the court may not place any restrictions on what an adult plaintiff in sound mind does with his money.[62] A court is thus, it seems, prevented from making its award subject to a reversionary trust, such as is necessary to achieve fairness with an overfunded contingency fund.

[6.5.5] Optimal expenditure criteria: Overcompensation can arise with allowances for future medical expenses at the maximum possible cost, without regard for the actual extent to which the plaintiff will in fact incur the expense. The courts are clearly aware of this problem and one thus finds today substantial deductions for 'general contingencies' from the capitalized

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[60] *Pallas v Lesotho National Insurance* 1987 3 C&B 705 (ECD) 713 provides an example of a contingency fund of 100% of the cost for a 75% risk. No provision was made for a reversion to the defendant who was here clearly prejudiced by the decision.

[61] *In re Estate Visser* 1948 3 SA 1129 (C) provides an excellent example of contingency funding based on a mortgage bond. The provider of the funds was thus not needlessly deprived of his assets.

[62] *Malgas v Guardian Assurance* 1960 1 C&B 158 (A).

value of expected expenditure.[63]

[6.5.6] No general solution: Contingency funds provide no general solution to the compensation problem, **but do give important insight into the nature and problems of a compensation model which purports to consume interest and capital over the expectation of life.** When compensation is assessed as the sum which will reproduce the lost income by consuming interest and capital over the expectation of life we are dealing with a contingency fund with a 50% chance of inadequacy.

[6.5.7] 'Another bite at the cherry': One may summarize the above considerations by saying that a contingency fund has the important characteristic that one may 'have another bite at the cherry', may claim more money, if one's original estimates prove incorrect. It is this characteristic that distinguishes a contingency fund so sharply from a once-and-for-all lump-sum payment. It is the absence of the opportunity to revise the payment that gives to a once-and-for-all lump-sum the character of price, 'value in exchange', 'verkeerswaarde'.[64] This is not to suggest that one can make a 'silk purse from a sow's ear'. The point is, however, that the prohibition on the revision of a once-and-for-all lump-sum payment, for all its warts, identifies the payment as a particular type of financial phenomenon, 'value in exchange', something with which we are all intimately familiar. It has formed the subject of intense study by economists. For the more frequently traded goods there may be an established market which provides direct evidence of value in exchange without the need to resort to indirect valuation procedures. With many of the simpler valuation problems a contingency-fund approach and a value-in-exchange approach lead to much the same numerical result. It is when the problems become more complex that the distinction needs to be borne in mind.

[6.5.8] Add-on for risk: In table 8[65] I have calculated the percentages by which the contingency funds based on the reduced risk criterion exceed the fund based on the expectation of life. These percentages illustrate an important feature of a contingency fund, namely that the prospect of risk requires an addition to the fund based upon an average. A risk averse person[66] will demand considerably more than value based on the average as compensation for the anticipated risks of living off a lump-sum payment. We know, however, that the courts, almost without exception, make a *deduction* for general contingencies.[67] **A deduction for risk is a feature of value in exchange.**[68] The fact that

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[63]*Kriel v Administrator-General, SWA* 1986 3 C&B 539 (SWA), 1988 3 SA 275 (A); *Ncubu v NEG Insurance* 1988 2 SA 190 (N) 198B.

[64]Van der Walt 'Sommeskadeleer' 280-1.

[65]At 109.

[66]Friedman & Savage 1948 *JPE* 279.

[67]See tables in Koch 'Damages' 334-8; Newdigate & Honey 'MVA Handbook' 295-301. See too 149 below.

[68]In share market analysis one finds reference to the 'beta adjustment' which is an upward adjustment to the discount rate of interest, ie a downward adjustment to the capitalized value (Weston & Brigham 'Managerial Finance' 267-8; Brigham 'Financial Management' 137-8). The discount rate of interest used to value a transaction comprises a basic return plus a premium for long periods of time plus an allowance for risk (Pepper 39 [1984] TFA 145 146-7; Weston & Brigham loc cit). The higher the discount rate of return the lower the present capitalized value.

the courts persist in making deductions suggests that, whatever they may say they are doing, in practice they apply an intuitive notion of value in exchange, not a contingency fund.[69] The assessment process is eclectic, drawing on an variety of financial models, not all consistent with one and other.

[6.6] CONCLUSIONS

The concept of consuming interest and capital in times of high rates of inflation requires a massive 'ballooning' of the original capital for many years. The prudent investor will save for a retirement that extends beyond his expected age at death, that is to say will refrain from consuming all interest and capital by the time of the expiry of the expectation of life. Investment in fixed-interest investments in times of high inflation will lead to an intolerable tax burden that renders tax-free growth investments far more attractive.

The relevance of contingency funds to claims by children for support from deceased estates deserves particular note. These are not claims for damages and are subject to different assessment principles.

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[69]Critics of the contingency deduction seem to have a contingency fund in mind (Boberg 'Delict' 598-9; Boberg 1988 *BML* 11 12). Considerations of utility require that 'there should be a further scaling down for the advantages of a lump sum as compared with the prospect of a long series of future and therefore uncertain payments' (Pearson Cmnd 7054 1978 vol 1 155 para 716; see too Pearce 'Cost-Benefit Analysis' 2ed 79).

CHAPTER 7

ANNUITIES

Summary: *Life annuities provide a medium for contractually transferring the risk of early and late death to a life insurer. The use of actuaries by the courts has its origin in the need for evidence as to the price at which to purchase a life annuity. This evidence has with time become corrupted into a fiction about consuming interest and capital over the expectation of life. In recent years there has been a resurgence of interest in life annuities in the form of 'settlement annuities'. There are a variety of different annuity contracts of which the 'annuity certain' and the 'life annuity' deserve special note. It was the practice in the classical Roman-Dutch law to ignore the price at which 'life annuities' were commercially available. That practice, with few exceptions, continues today.*

[7.1] DEFINITIONS

An annuity is the right to two or more payments,[1] usually at monthly or yearly intervals, perhaps subject to various conditions. An annuity is distinguished from a loan at interest by the feature that at the end of the term there is no repayment of the original capital.[2] There are a variety of different types of annuity distinguished by the contingencies to which they are subject:

[7.1.1] Life annuity: The right to a series of periodic payments, usually made monthly or yearly, **which will cease upon the death of the contingent life.**

[7.1.2] Joint-life annuity: An annuity payable **until the first death** amongst the two or more contingent lives.

[7.1.3] Joint-life and survivor annuity: An annuity payable **until the last death** amongst two or more contingent lives.

[7.1.4] Deferred life annuity: The right to a series of periodic payments **commencing at some future time**, usually retirement age and thereafter payable until the death of the contingent life or lives.[3] This annuity is familiar to the South African public as a 'retirement annuity' or simply 'annuity'. This last colloquial usage can be a source of some confusion

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[1] *SIR v Watermeyer* 1965 4 SA 431 (A).

[2] *KBI & MMF v Hogan* 1993 (A) (unreported 28.5.93 cases 663/91 & 683/91).

[3] Such annuities are usually guaranteed payable for the first 5 or 10 years after commencement regardless of whether the contingent life lives or dies.

when annuities, in the more formal sense, are discussed.

[7.1.5] Immediate annuity: An annuity in terms of which **payments commence immediately.** In this thesis the word 'annuity' refers to an immediate annuity, as distinct from a deferred annuity.

[7.1.6] Annuity certain: The periodic payments are unconditionally guaranteed for a stated period of time, regardless of whether the annuitant lives or dies.

[7.1.7] Increasing annuity: The periodic payments increase on a regular basis according to a stated formula or set of rules. Usually there is a fixed rate of increase (5% 10% or perhaps 15% per year compound or simple).[4] Some increases are determined on a 'with profits' basis, ie according to the investment profits achieved by the particular life office underwriting the contract.[5] There is a reported instance from Australia of a life annuity which increases in line with the consumer price index.[6]

[7.1.8] Settlement annuity: This is an immediate increasing life annuity actuarially designed by a life office to provide for instalments of compensation for loss of income or support. Evidence of the purchase price for such an annuity has been used in lieu of the more usual form of actuarial evidence.[7] The MMF effectively issues such an annuity when it elects to pay compensation by instalments.[8] For a number of reasons South African life insurers are unwilling to quote for such annuities.[9]

[7.1.9] The right to an annuity: This is acquired by the payment of a lump sum to the insurer, the price or premium. A number of life offices[10] will these days provide a surrender value should the owner of the contract wish to redeem the remaining capital. With retirement annuities there are restrictions placed by legislation on the extent to which capital may be withdrawn. Under a life annuity the insurer may demand evidence of good health before releasing the surrender value.

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[4]Such contracts are issued by Sanlam, Old Mutual, Norwich Life, inter alia.

[5]The increasing annuity offered by Liberty Life would seem to be of this nature.

[6]Gratton 'Immediate Annuity Business in Australia' 1985 (unpublished) 'at least one office in Australia already offers CPI indexed annuities'. The political uncertainty of the South African economy renders such contracts unduly risky for South African insurers who must consider the possibility of a long period of high inflation rates coupled with low investment returns.

[7]Blattenburg (1986) 20 *The Actuary* 5; *Lloyd's List* August 9 1991; Patel 1993 *The Actuary* 16. In England settlement annuities provide a means for introducing actuarial evidence which would otherwise not be acceptable (see Koch 'Damages' 49).

[8]In terms of article 43 of MMF agreement ito Act 93 of 1989. See *Marine & Trade Insurance v Katz* 1979 4 SA 961 (A).

[9]For such a scheme to work every claimant must be compelled to invest the compensation-money with the life insurer and write it all off in the event of death. This eliminates what actuaries call adverse selection. It is well known that persons who voluntarily purchase life annuities have above average expectations of longevity. Life insurers in South Africa are also unwilling to assume liability for payments which increase in line with wages or commodity prices (see 132).

[10]Sanlam, Federated Employers, inter alia. The facility is not generally advertised.

[7.1.10] Taxation of annuity payments: In general annuity payments are gross income and subject to income tax.[11] If the annuity has been purchased with free capital,[12] then the capital content of the payments is not taxed.[13] An actuarial certificate is issued by the life office as to the proportion of the regular payment that represents capital. With increasing annuities this leads to a far more favourable tax position than with fixed interest deposits because the initial taxable income is relatively low compared to interest receipts on invested capital. With fixed-interest deposits subject to consumption of interest and capital the interest income will decline as the years go by; with an increasing annuity the taxable income will increase in line with the annuity payments. If the tax tables are regularly adjusted downward for fiscal drag[14] the average tax liability is far less with the increasing annuity that it would be for an equivalent interest-bearing deposit.

Annuities paid in terms of ss39(1)(c) or (d) of the Workmen's Compensation Act[15] are exempt from tax.[16] The exemption does not apply to temporary pensions payable in terms of s38 nor to payments for loss of support made in terms of s40. This is probably an oversight. The incomes involved are usually so small that they, in any event, do not give rise to a liability for taxation.

Revenue practice is to tax instalments of lost earnings or support made in terms of the Multilateral Motor Vehicle Accidents Fund Act[17] except when such payments are made in respect of medical and related expenses.

[7.2] FORENSIC APPLICATIONS

[7.2.1] Price of a life annuity: The issue price, the premium payable for the right to a life annuity, is these days calculated using the year-by-year method. During the 19th century the issue price was often calculated using the gross multiplier method, a safe approach for the life office since, as I have noted,[18] the gross multiplier method tends to overstate the present value, that is to say the issue price. The original purpose of actuarial evidence would seem to have been to advise the court as to the appropriate price for the issue of a suitable *life annuity*. The earliest recorded use of an actuary by a South African court was in 1886 when Mr Mouat was called 'to shew that it would require about £1100 to buy an annuity of £104 on the life of a man aged 48'[19] and between £703 and £861 to secure an annuity 'upon the

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[11]*SIR v Watermeyer* 1965 4 SA 431 (A); definition of 'gross income' subsec (a) of s1 of Income Tax Act 58 of 1962. See too *KBI & MMF v Hogan* 1993 (A) (unreported 28.5.93 cases 663/91 & 683/91).

[12]That is to say capital which does not by law have to be invested through an approved pension funding scheme.

[13]s10A Income Tax Act 58 of 1962.

[14]See 232.

[15]30 of 1941.

[16]s10(1)(gB) of Income Tax Act 58 of 1962.

[17]Article 43 of MMF agreement ito Act 93 of 1989.

[18]See 97.

[19]*Clair v PE Harbour Board* (1886) 5 EDC 311 317sup.

contingency of the joint lives of plaintiff and her late husband'.[20] The court here clearly had in mind *life annuities* and not *annuities certain*. This would seem to be the first, and the last, case in which a South African court has made any clear distinction between the two types of annuity. There is one subsequent explicit reference to a life annuity but it is by no means clear that the court appreciated the significance of the words.[21]

[7.2.2] Changing perceptions: A number of judgments from the early twentieth century would seem to suggest that the purchase of an annuity certain was at least contemplated.[22] In 1935 we find the first reference to a plaintiff consuming interest and capital,[23] a notion which was subsequently given unambiguous expression in *Gillbanks v Sigournay*.[24] The notion of a plaintiff who himself, instead of the life office, consumes interest and capital has substantially displaced consideration of a purchased annuity.[25] It may be that this displacement is more a preference for a particular terminology than a conscious decision in favour of any particular financial instrument. It may well be that the purchase of an annuity certain, a life annuity or self-investment and consuming interest and capital are not properly distinguished from one another and are thus all perceived, for practical purposes, to involve restitution through the medium of consuming interest and capital. What is clear is that the role of risk has been increasingly ignored by the forensic dialectic, possibly due to the absence of an adequate theoretical basis for its inclusion.

[7.2.3] Modern life annuities: The availability of life annuities has certain significance within the modern context:

* A life annuity permits a risk-averse plaintiff to insure himself against the risk of living too long. The rates for early ages are unattractive[26] by comparison with other investment media, such as participation mortgage bonds.[27] A diligent investor would probably defer the purchase of an increasing life annuity until his late 60's or early 70's when a significant advantage is perceivable.[28] Comparison with a fixed-interest

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[20] *Clair v PE Harbour Board* (1886) 5 EDC 311 318sup.

[21] *Butler v Durban Corporation* 1936 NPD 139 150.

[22] See, for instance, *Chisholm v ERPM* 1909 TH 297 302; *Waring & Gillow Ltd v Sherborne* 1904 TS 340; *Dale v Hamilton* 1924 WLD 184 204.

[23] *Davies v Crossling* 1935 WLD 107 114.

[24] 1959 2 SA 11 (N) 15A.

[25] Some jurists still allude to the purchase of an annuity certain: Davel 'Skadevergoeding' 99n615; Boberg 1988 *BML* 11 (Boberg does not distinguish between consuming interest and capital and the purchase of an annuity).

[26] Largely due, it seems, to life office fears of selection against the office by persons of unusual longevity. The poor competitiveness of the rates for young ages may also reflect an unwillingness by the offices to write annuity business of very long duration.

[27] These offer comparable if not better short-term returns and guarantee a return of the capital invested. See table 10B at 123 for rates of interest on PMB schemes.

[28] For earlier ages the rate of return does not significantly exceed that available on investments which do not require the forfeiture of capital.

deposit leads to a perception that the purchaser's capital is forfeited to the life office.[29]

* The ability to purchase an increasing annuity certain provides access for persons with limited capital to the very high rates of investment return achieved by life offices. Investment income can be released at rates appropriate to the needs of the investor. The problem of forfeiture of capital on early death can be avoided by using annuities certain coupled with an endowment plan. This form of investment can be taken for a period as short as 10 years. This availability of this investment medium, and the associated high returns, can have considerable relevance to the duty of mitigation.[30]

[7.2.4] Discount rates of return: In *Kotwane v UNSBIC*[31] the court took judicial notice of a **nominal** discount rate of interest of 5% per year compound. One sometimes finds similar unrealistically low nominal discount rates used by actuaries, although instances of this have become rare. As I have noted above the availability of increasing annuities ensures that even claimants with fairly small amounts of money can invest at quite good rates of return. A survey of increasing annuity prices in 1991 indicated a rate of return to the purchaser of about 17% per year compound,[32] well above the rate of inflation.

[7.2.5] Immunisation theory: Actuarial theory as regards the discount rate for pricing immediate annuities focuses on fixed-interest investments coupled with annuity payments that do not increase. This permits 'immunisation'[33] and avoidance of the 'reinvestment risk'.[34] These considerations, however, are generally given only lip service by life insurers in South Africa when competing for investor funds by way of immediate annuity contracts:

* In South Africa there are insufficient fixed-interest investments of long enough duration to permit immunisation in the classical sense.
* The rates at which immediate annuities are being issued (17% per year in 1991) discount returns that exceed the rates available on fixed interest investments (16,3% per year in 1991).[35] The rate of 17% per year is the internal rate of return[36] offered by

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[29]This is true of the standard form of immediate life annuity quoted by a life office. A guarantee of a return of capital can be obtained by writing a whole life contract together with a life annuity contract, but then with a major reduction in the rate of return offered by the contract.

[30]In *Kotwane v UNSBIC* 1982 4 SA 458 (O) 466-7 the court did its own actuarial calculations and adopted a net capitalization rate of *minus* 6,25% per year. The plaintiff could at the time have purchased an increasing annuity certain based on a net capitalization rate of about 0% per year which included allowance for real increases in earnings above the rate of inflation.

[31]1982 4 SA 458 (O).

[32]Based on a survey in 1989 of 5 life offices that issue such contracts. A follow-up survey in 1991 revealed much the same levels of discount rates. In 1993 the rates have dropped to about 1% per year compound.

[33]See, for instance, Redington 1952 *JIA* 286.

[34]When a future interest payment is received the investment rates then current may be different, higher or lower, from those at which the original investment was made. Where use is made of an expected future rate of return there is an implicit assumption that the reinvestment rates will be the same as the original investment rate. This is a valid assumption for pricing one-off payments, such as damages awards, but not necessarily valid when the solvency of a life office may be at risk and reserves need to be set up to ensure continuing solvency.

[35]See table 10B at 123.

the contract to the investor.[37] The life office actuary would have used a higher discount rate but would then have built in allowance for the expenses of the life office, thereby reducing the effective internal rate of return to the investor. Observed high rates of return on immediate annuities can only explained if one assumes investment in growth investments such as share market equities and immovable property. The pricing of immediate annuities in South Africa has not been the subject of any paper to the Actuarial Society.

* The contracts used for the survey that revealed an internal rate of return of 17% per year were all with payments increasing over 25 years at 13,2% per year compound. The long period and fact of increasing instalments placed the problem firmly outside considerations of the classical theory. The actuary setting the rates was thereby compelled to take a view on the expected long-term investment return in general.[38]

I conclude that actuarial theory as regards immunisation and avoidance of reinvestment risk is irrelevant to the assessment of damages for a single individual. This is so not only because of the inordinately long periods of time usually covered by an assessment, but also because the calculation has regard to payments that increase, usually in line with inflation. The theory, in any event, seems to be little applied, even in the life office context.

Prevett[39] lists a number of objections to the use of life annuities for compensation purposes but these objections reflect more on the limited nature of the contracts available than on the principle in general. The more flexible forms of annuity contracts have been designated 'settlement annuities'.[40]

[7.3] THE ROMAN-DUTCH PRACTICE

[7.3.1] Market values: The available evidence suggests that in 17th century Holland the courts ignored the current market prices for life annuities and based compensation on the tables from the Digest,[41] by then 1000 years old. The commercial rates, unlike modern rates, had no regard for the age of the contingent life. Quite apart from this aspect the financial differences are quite startling. Table 9 below shows 16th and 17th century commercial rates[42] together with Ulpian's life table from the Digest.

[7.3.2] Meaning of 'lijfrente': Grotius notes that compensation for dependants should be calculated on the basis of a 'lijfrente'[43] regard being had to the age of the deceased.[44]

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[36]See 128.

[37]Contracts (annuities certain) free of the mortality risk were examined.

[38]See 135.

[39]1972 *MLR* 140 144 155.

[40]See 114.

[41]See table 1 at 15.

[42]Kopf (1927) 13 *PCAS* 225 238; Houtzager '*Lijfrenteleningen*' 43 58 73 74 84 85 90 98. The bond rate refers to what we would today call fixed interest government bonds. Withey 'Annuities' 107 records that life annuities about 1800 were yielding 12% to 14% per year, ie 7 to 8 years' purchase.

[43]Grotius *Inleiding* 3.33.2 '*ghereeckent by maniere van lijfrente*'.

TABLE 9 - EUROPEAN LIFE ANNUITY & BOND RATES

ULPIAN'S TABLE			Years' ---Purchase---		
Age	Years' Purchase	Year	Single life	Joint life	Bond rate
0-20	30	1554	6	8	8,3%
21-25	28	1606	7	9	7,1%
26-30	25	1608	8	10	6,3%
30-35	22	1634	9	11	5,0%
36-40	20	1646	10	12?	5,0%
40-50	60-age-1	1653	11	13?	5,0%
50-55	9	1665	12	15?	4,0%
55-60	7	1671	14	17	4,0%
61 +	5				

Rates flagged with '?' have been estimated.

Years' purchase is the present value of one unit of currency after discounts for delay and the risk of death. This is the multiplier to be applied to the yearly amount to obtain the capital sum. The lower the multiplier the lower the capital sum and the higher the associated discount rate of return.

The allowance to be made for mortality was not based on any scientific life table approach as it is today. A form of 'gut feel' approach seems to have been used, strongly influenced by what was popularly considered to be a fair price. An attempt by De Witt to place annuity price calculations on a sound basis (see paragraph 7.3.3) was one of the factors harked on by his enemies in bringing about his downfall.

Grotius was well aware of the commercial rates.[45] His note that account be taken of the age of the deceased clearly points to Ulpian's table, despite the dramatically lower values for commercially available life annuities.[46] It is interesting to note that in the 17th century the standard joint life annuity expired on the last death, and not on the first death as is required for dependency calculations. One could not in those days buy a life annuity as one may

[44]Grotius *De belli ac pacis* 2.17.13 '*ratione habita aetatis occisi*'.

[45]Grotius *Inleiding* 3.14.19 '*soo magmen oock voor ghereed geld niet meer renten koopen dan de redelickheid toe en laet, te weten zes ofte zeven ten honderd*'; *3.14.20 'Hier van zijn vrij de lijfrenten, dat is renten die alleen duiren soo lang als duirt het leven van de rentheffer*'.

[46]This is the view of Feenstra 1958 *AJ* 27 31n23 and Davel 'Broodwinner' 126n95.

today. Governments and municipalities raised capital by the issue of life annuities.[47] Only when such a fund-raising issue occurred could a life annuity be purchased. There was no market such as exists today for trading in the fixed interest securities of government and semi-government bodies.

[7.3.3] Johan de Witt: In table 9 one may observe a trend of declining interest rates during the 17th century in Holland. This did not reflect the operation of free market forces but government intervention in a deliberate attempt to keep down the cost of the borrowings needed to fight the incessant wars. The mastermind behind the reduction in interest rates was Johan De Witt, onetime advocate and later 'Raadspensionaris' of Holland. In 1671 De Witt presented the States General with a life annuity scheme calculated using a scientific year-by-year technique. The resulting annuity prices were far higher than the Hollanders had been accustomed to pay. De Witt's political enemies accused him of seeking to line his own pocket and the scheme was rejected. With the coming to power of the Prince of Orange in 1672 De Witt and his brother were gaoled and then officially executed.[48]

[7.3.4] Voet's silence: Life annuities became in the process a politically charged issue and the discussion of loans and life annuities became a socially taboo topic.[49] It has been noted by South African courts that Voet does not mention 'lijfrenten' as a basis for assessing compensation for personal injury and death.[50] If one bears in mind that Voet was an impressionable 23 year-old when De Witt met his horrendous end one may speculate that Voet tactfully refrained in his writings from any discussion of life annuities.

[7.3.5] The rise of life offices: De Witt's tragic tale was but a forerunner of a wave of annuity schemes, sound and unsound, that were inspired by the new mathematical techniques. Notable amongst these was the taking over of the finances of England by the South Sea Company. To stem the tide of unsound schemes the 'Bubble Act' was passed.[51] The South Sea 'bubble' collapsed shortly thereafter leaving many destitute.[52] These events led to legislation to restrict the issue of life annuities to approved institutions subject to actuarial control.

The earliest mathematical technique was what we today know as the gross multiplier

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[47]This practice was by then on the wane but had been the dominant fund raising technique during the medieval centuries (AD1000 to AD1500) when the prohibition on borrowing at interest had been at its most intense (Cambridge Economic History vol 3 527-53 vol 5 358-92; Kopf (1927) 13 *PCAS* 225 230).

[48]Bouwstoffen '*Levensverzekeringen en Lijfrenten*' 27 '*Met geweldt uyt de Gevangenpoorte ghehaeldt, doodt gheslagen, ende haerluyder Lichamen schandelijck ende Moeder-naeckt op 't Schavot gebracht, ende met de Beenen aen de Wip aldaer staende ghehangen*'. De Witt is today remembered as one of Holland's great statesmen and his statue stands before the Hague.

[49]'*Men hoort weinig meer spreken van leeningen en lijfrente*' Bouwstoffen '*Levensverzekeringen en Lijfrenten*' 27 .

[50]*Hulley v Cox* 1923 AD 234 243-4; *Maasberg v Hunt Leuchars & Hepburn* 1944 WLD 2 14-15.

[51]Bubble Companies etc Act 1825 (6 Geo 4c91)

[52]Kopf (1927) 13 *PCAS* 225 253-5.

method[53]. This was superseded by the more accurate year-by-year method[54] which was first made public in the writings of De Moivre and Simpson during the years 1740 to 1744. Once a sound mathematical basis had been established for tackling the contingencies of human life it was possible for the first time to conduct life insurance business on a scientific basis. In 1756 the Equitable Assurance Society was formed by Royal Charter. The 'Old Equitable' conducted business **on the novel basis of charging a premium that varied according to the age of the life to be assured.** In 1777 the 'Annuity Act' was passed placing onerous registration requirements upon those who wished to issue annuities. The scientifically managed life offices, the 'Old Equitable', the 'Royal Exchange' and others, were granted exemption from the requirements of the Act.[55] This placed the life annuity business exclusively in the hands of the life insurance companies and today in South Africa only licensed insurers are permitted to conduct life annuity business.[56]

[7.4] CONCLUSIONS

Life annuity contracts are historically important to an understanding of modern forensic attitudes to damages contingent upon human life.

Increasing annuities for short periods, such as 10 years, provide a useful investment medium, particularly for smaller awards. Life annuities proper are not generally popular as an investment medium because they are perceived as requiring the investor to forfeit his capital when he dies. There are a number of other technical difficulties with using conventional life annuities as an investment medium.

The discount rate of return used by life-office actuaries in South Africa to price life annuities is determined primarily by considerations of competition for investors' funds and thus provides one of the best guides to future investment returns.

'Settlement annuities' have had their greatest success in jurisdictions where actuarial evidence is otherwise unacceptable, as in England, or where complex financial issues need to be communicated to an unsophisticated audience such as a jury. Neither of these factors prevail in South Africa. Instalment settlements in terms of third-party legislation provide a form of settlement annuity.

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[53]See paragraph 6.1.1.

[54]See paragraph 5.4.1.

[55]Supple 'The Royal Exchange Assurance' at 118n.

[56]See definition of 'life business' s1 of the Insurance Act 27 of 1943.

TABLE 10A - YIELDS ON STOCK EXCHANGE EQUITIES: 1960 - 1991

Year	*Div Yield*	*Capital Growth*	*Total Yield*	*CPI*	*Real Yield*	*Averages 10yr*	*15yr*	*20yr*
1960	7,1					9,5	7,7	10,9
1961	7,0	3,2	10,2	2,0	8,3	8,9	6,2	9,7
1962	6,1	20,8	26,9	1,5	26,3	11,1	5,6	9,3
1963	5,5	17,0	22,5	1,1	22,1	8,5	5,6	8,3
1964	5,3	13,4	18,7	2,5	16,5	7,3	8,3	7,4
1965	5,3	1,8	7,1	3,7	3,3	4,3	9,6	8,2
1966	5,1	15,0	20,1	3,7	16,6	1,3	7,5	8,9
1967	4,5	14,1	18,6	3,3	15,4	1,4	7,6	7,1
1968	3,1	46,1	49,2	1,8	48,0	(0,5)	4,9	5,1
1969	3,7	(13,2)	(9,5)	2,9	(12,5)	6,3	5,7	7,4
1970	5,5	(29,7)	(24,2)	4,9	(29,3)	12,4	9,6	8,3
1971	5,3	4,1	9,4	6,4	3,0	10,5	11,4	8,8
1972	3,7	57,2	60,9	6,5	53,1	7,6	6,9	5,7
1973	5,1	1,2	6,3	9,5	(2,9)	8,1	7,2	
1974	6,4	9,5	15,9	11,6	4,4	7,4	9,1	
1975	8,1	(18,9)	(10,8)	13,5	(22,8)	12,4	9,6	
1976	8,6	(10,9)	(2,3)	11,2	(13,0)	17,0	11,6	
1977	7,3	20,6	27,9	11,0	16,6	13,1	9,3	
1978	6,6	27,8	34,4	10,9	22,8	11,0		
1979	5,2	81,8	87,0	13,2	69,0	8,5		
1980	7,0	32,2	39,2	13,8	24,3	4,2		
1981	7,9	(7,3)	0,6	15,1	(13,1)	7,0		
1982	5,5	27,0	32,5	14,7	16,8	3,8		
1983	5,7	8,1	13,8	12,3	1,7			
1984	5,6	3,6	9,2	11,6	(2,0)			
1985	4,9	34,4	39,3	16,2	21,3			
1986	3,8	49,1	52,9	18,7	30,4			
1987	4,7	(8,0)	(3,3)	16,1	(17,0)			
1988	4,5	9,6	14,1	13,0	1,4			
1989	3,6	49,5	53,1	14,7	35,0			
1990	4,1	(8,6)	(4,5)	14,3	(16,8)			
1991	3,3	26,5	29,8	15,3	13,3			
1992	3,6	(5,4)	(1,8)					
Averages	5,4	12,4	17,8	9,5	8,3			

Source: 'The Quantum Yearbook' 1993 50

TABLE 10B - YIELDS ON FIXED-INTEREST INVESTMENTS: 1960 - 1991

Year	*CPI*	*Yield Index*	*Escom Stock*	*Part Bonds*	*Home Loans*	*Bank Deposits*	*Guardians Fund*
1960	1,3	5,3	5,8	6,2	6,5	5,0	4,0
1961	2,0	5,8	6,3	6,7	7,0	5,5	4,5
1962	1,5	5,4	5,3	5,7	6,5	4,5	4,5
1963	1,4	4,8	5,1	5,7	6,5	4,5	4,5
1964	2,5	4,8	5,6	6,2	7,0	5,5	4,5
1965	3,7	5,6	6,7	6,7	7,5	6,0	4,5
1966	3,7	6,3	7,0	7,6	8,5	6,5	4,5
1967	3,3	6,5	7,3	8,1	8,5	7,0	5,0
1968	1,8	6,5	7,2	8,1	8,5	6,5	5,0
1669	2,9	6,5	7,3	8,6	8,5	7,0	5,3
1970	4,9	7,1	8,8	8,6	9,0	7,5	5,5
1971	6,4	8,4	9,3	9,5	9,0	7,5	6,0
1972	6,5	8,4	8,4	9,5	9,0	7,0	6,4
1973	9,5	7,8	8,3	8,5	8,3	6,5	6,5
1974	11,6	9,0	11,3	11,0	10,3	10,0	6,8
1975	13,5	9,7	11,4	11,5	10,5	10,0	6,9
1976	11,2	10,4	12,7	12,0	10,5	10,0	7,2
1977	11,0	10,9	11,6	12,0	10,5	10,0	7,8
1978	10,9	10,4	10,0	11,0	10,5	9,0	7,9
1979	13,2	9,3	9,5	9,0	11,5	7,5	8,5
1980	13,8	10,1	12,2	9,0	11,8	9,5	9,0
1981	15,1	13,0	13,4	14,5	14,3	14,0	9,0
1982	14,7	13,4	11,8	18,5	16,3	14,5	9,5
1983	12,3	12,7	14,5	17,5	17,0	16,0	9,5
1984	11,6	15,3	16,6	22,3	20,0	18,0	10,1
1985	16,2	16,7	18,7	16,0	19,8	16,0	10,8
1986	18,7	16,8	15,5	14,0	16,0	12,8	11,9
1987	16,1	15,4	15,7	12,5	14,5	13,0	12,4
1988	13,0	16,4	16,6	15,0	16,8	15,0	12,8
1989	14,7	16,8	15,5	18,0	20,0	17,5	13,0
1990	14,3	15,9	15,8	19,0	20,0	18,5	14,5
1991	15,3	16,2	16,3	18,0	20,0	17,5	14,5
1992	13,9	15,2	15,0	15,0	16,8	12,8	15,0
Avge	9,5	9,9	11,0	11,6	12,0	10,2	8,1
Excess over CPI		0,4	1,5	2,1	2,5	0,7	(1,4)

Source: 'The Quantum Yearbook' 1993 48

CHAPTER 8

THE TIME VALUE OF MONEY

Summary: *The 'discount rate of interest' is preferably described as the 'discount rate of return'. A nominal rate (I) comprises a real rate of return (R) and an offset to inflation (F). For compensation calculations R is the most important measure. Historical analysis suggests that for South Africa R has a value of about 2,5% per year compound. The net capitalization rate will be different from R if the cash flow to be valued does not escalate in line with inflation. The allowance for the risk aspect of general contingencies is best achieved by an increase to the discount rate of return.*

[8.1] BASIC CONCEPTS

[8.1.1] Disutility of delayed payment: A payment of R10000 immediately has greater present value than an equal payment of R10000 due in ten years' time.[1] The proposition is true whether the R10000 is subsequently adjusted for inflation or not. The difference is the disutility of delay, that is to say that people will prefer to receive R10000 now rather than later.[2] Typical of all personal utilities some people are less concerned about delayed payment than others. The discount for delayed payment is commonly ascertained by consideration of what amount invested now will yield R10000 in ten years' time. This procedural definition objectivizes the discount.

It needs to be borne in mind, however, that in most instances of damages assessment the period of investment is uncertain because the claimant may die soon or live a very long life. There will also be the general contingencies that attach to earnings or support or future expenses. There is usually no question of the claimant using his award by consuming interest and capital to reproduce the required payments. For this reason the discount rate of return has an abstract quality when used in damages assessments. Bearing in mind that the lump sum awarded by way of damages is compensation, that is to say a price reflecting the present utility of what has been lost, **it is preferable to view the discount rate of return as a pure time-money preference. In other words the disutility of delay** rather than the actual return which the claimant will achieve on his compensation money.

[8.1.2] Estimated market value: Consider the sale of a business or block of flats or offices by a willing seller to a willing buyer. Payment of the agreed purchase price acquires not only ownership of the asset **but also entitlement to all incomes and profits generated by**

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[1] '*Onzeecker ende toekomend goed niet soo veel waerd en is, als het zekere ende tegenwoordige*' Grotius '*Inleiding*' 3.32.16.

[2] Pearce 'Cost-Benefit Analysis' 2ed 37-40.

that asset, and other benefits from the use thereof.[3] In other words **the market value of the asset includes the present value of all income and profits expected from that asset.** If by reason of a wrongful act there is a prospective loss of income or profits the market value of the asset will decrease. **The present value of the future loss of profits or income is the reduction in the market value.** Alternatively one might assess the present value of the loss by discounting at interest using a net capitalization rate of about 2,5% per year, say, and then making a deduction for general contingencies to allow for the risks and uncertainties. This is the method generally used when assessing damages for personal injury or loss of support. A third approach is to build the general contingencies into the discount rate of interest and then discount to present value using a very high net capitalization rate of 5% to 30% or more per year compound.[4] These are all different ways of arriving at the reduction in present value of the future losses of income or profits that have been caused by the wrongful act. Each of these approaches is valid and whenever possible more than one approach should be used, the one being used as a check on the other.[5] The ultimate purpose of the inquiry is to identify a fair present value for what has been lost. With damages for personal injury and death there is no commercial market where earning capacities, or rights to support, are traded for lump-sum prices. For this reason it is not possible to check the validity of the discounting process by reference to actual lump-sum market values, as can be done with a business or a block of flats. Nonetheless it is useful to bear in mind that the result of a calculation discounting future losses for interest and general contingencies is merely an estimate of the notional lump-sum price that would be agreed if there was a commercial market.[6]

[8.1.3] Duty to mitigate: The assessment of damages, I have previously noted,[7] is characterized by a tension between concretization, meticulous regard for the personal circumstances of the victim, and abstraction, the use of generalized rules which ease the burden of proof and speed up the assessment process. In theory a court should not deny a claimant or defendant the right to concretize. In practice exceptions to this guideline are to be found in the victim's duty to mitigate his damages and in the rules which require that certain collateral benefits be disregarded in the assessment process.[8] The disutility of delay in the payment of past debts has been held to be zero,[9] an example of legal abstraction. Future payments, however, when compensated by a present lump sum, will be reduced for the advantage of being received earlier.[10] In theory a claimant could testify that for him

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[3]See footnotes 22 at 8, 170 at 30, 55 at 221.

[4]See table 11 at 161.

[5]See paragraph 3.3.9.

[6]See paragraph 12.1.4 for discussion of similarity between pricing earning capacity and pricing a block of flats.

[7]See 31.

[8]See, for instance: Assessment of Damages Act 9 of 1969; *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 153; *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 920-1.

[9]*SA Eagle Insurance v Hartley* 1990 4 SA 833 (A).

[10]*General Accident Insurance v Summers* 1987 3 SA 577 (A).

payment in advance has no advantage, no positive utility.[11] It is conceivable that a court would then award compensation without making a discount for the advantage of early receipt. It is more likely, however, that a court apprised with such evidence would objectivize the disutility of delay by observing that the claimant should mitigate his damages by profitably investing the compensation money.[12] The expected return on the investment of the award would then be the measure, for compensation purposes, of the utility of the time value of money.

[8.1.4] Objective investment standard: That objectivization is the general rule is evident from the total absence in court records of any mention of an actuary having consulted with the claimant as regards the claimant's investment abilities. This is consistent with the principle enunciated in *Radebe v Hough*[13] that the utility of money awarded to a claimant should be the same for all claimants. In *Boonzaier v Provincial Insurance*[14] the court used as a discount rate the lower returns available from the Guardian's Fund. The modern tendency is, however, to create a trust[15] thereby avoiding the relatively low rates of interest paid by the Guardian's Fund.[16] Exceptional costs associated with the management of the money will lead to an increased award.[17] As a general rule the rate of return assumed for discounting purposes would be net of investment management charges.[18]

[8.1.5] Internal rate of return: The expected return on an investment is generally expressed as a yearly proportionate rate of increase to the monetary value of the investment, typically 20% per year compound.[19] Compounding implies that the increase in year two builds on

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[11]This is probably true of many poorly educated persons living in subsistence economies where money plays only a minor role. Such persons may well keep cash savings under the mattress or in a box buried in the garden.

[12]Usually on the basis of actuarial testimony (for example, *Shield Insurance v Hall* 1976 4 SA 431 (A) 443; *AA Mutual Insurance v Maqula* 1978 1 SA 805 (A) 812F; *Ngubane v SATS* 1991 1 SA 756 (A) 781E). There are recorded instances, however, when courts have taken judicial notice of the expected advantage from investment (*Protea Assurance v Matinise* 1978 1 SA 963 (A) 975E-F; *Shield Insurance v Booysen* 1979 3 SA 953 (A) 963C-D). In *Kotwane v UNSBIC* 1982 4 SA 458 (O) 466 the court refused a request to lead actuarial evidence and did its own actuarial calculation using a discount rate of its own choice.

[13]1949 1 SA 380 (A).

[14]1954 1 C&B 87 (C).

[15]See, for instance, *Dyssel v Shield Insurance* 1982 3 SA 1084 (C).

[16]Over the 32 years from 1960 to 1992 average rates for the Guardian's Fund were 8,1% per year compared to an inflation rate of 9,5% per year and average returns on participation mortgage bonds of 11,6% per year (see table 10B at 123).

[17]*Marine & Trade Insurance v Katz* 1979 4 SA 961 (A) 985; *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1029D-G; *Arnold v Teno* (1978) 83 DLR (3d) 609 (SCC) 635-6. These cases are concerned with the administrative costs of a *curator bonis* rather than the cost of skilled investment advice.

[18]Fama 'Foundations of Finance' 141-2 observes that the additional returns provided by skilled investment advice roughly match the cost of acquiring that advice. A survey by my office of the pricing of immediate annuity contracts issued by five life offices in March 1987 (unchanged at November 1991) revealed yields of 16,6% to 17,4% per year net after management expenses compared to a long-term Escom stock yield of 15% per year (16% per year in 1991; see table 10B at 123). The life office would in this instance serve as the skilled investment manager.

[19]Table 10A at 122 shows an average return over 30 years of 9,3% per year on share-market equities above the rate of inflation. If future inflation is expected to be 13% per year this implies a nominal rate of return of 23,5% per year (1,235=1,093x1,130).

both the original capital and the capitalized return from year one. The traditional analysis of investment returns uses fixed-interest investments as its paradigm. The annual rate of return is then referred to as the 'discount rate of interest'. This terminology focuses exclusively on fixed-interest investments when regard really needs to be had to the entire range of possible investments, particularly immovable property and share market equities. For this reason it is preferable to use the expression 'discount rate of return'. Financial analysts prefer the expression 'internal rate of return' (IRR)[20] being the yearly rate of accrual needed to roll up the initial investment to its final value, including allowance for all capital growth, or depreciation, and payments of interest,[21] dividends or rents. In this sense the rate of return is an abstract ratio that is derived from the investment model,[22] that is say from the formula relating input rands to output rands.

[8.1.6] Historical returns: The figures in table 10A[23] are derived from the JSE Actuaries All-Share Index for December each year. The average return is based on a geometric average (also known as logarithmic). The figures reflect the returns available to persons who invest in a portfolio comprising the same assets as the index. In practice private individuals must be satisfied with a smaller spread of investments such is can be obtained by purchasing units in a mutual fund.[24]

[8.1.7] The nominal rate and its components: The expected rate of return on an investment will include what the investor requires to offset inflation and also to offset the risks attaching to the investment. For fixed-interest investments this rate is known as the **nominal rate of return** (I)[25] and needs to be distinguished from the **real rate of return** (R) which is the nominal rate of return less the rate of inflation (R=I-F).[26] Thus for example a nominal rate

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[20]McCutcheon & Scott 'Mathematics of Finance' 38 88; Weston & Brigham 'Managerial Finance' 216-17; Mishan 'Cost-Benefit Analysis' 1ed 118-24. The concept of an internal rate of return goes hand-in-hand with a financial model reflecting expected payments (Brigham 'Financial Management' 437).

[21]On long-dated fixed-interest investments which are traded the internal rate of return does not equal the rate of interest (the so-called 'running yield'), unless the price paid for the investment was equal to the maturity value. Government stocks, for instance, are not like building society fixed deposits. They are bought and sold at prices which reflect a premium or discount on the maturity value. The capital differential on maturity gives rise to an internal rate of return different from the running yield. Fixed-interest stocks are often traded by reference to the internal rate of return rather than the price per R100 of stock. This practice implies that the interest payments can be re-invested at the same rate as the yield. For the longer dated stocks this is probably a reasonable assumption for purposes of choosing between different investments.

[22]Brigham 'Financial management' 3ed 80n2 'In finance the term *model* refers to an equation or set of equations designed to show how one or more variables affect some other variables. Thus, a bond valuation model shows the mathematical relationship between a bond's price and the set of variables that determines this price'. Conversely the price may be known and the formula is then used to give the associated internal rate of return.

[23]See 122.

[24]My office has analyzed the performance of three general mutual funds (UAL, Guardbank, Old Mutual) using the same method as in table 10A at 122. This analysis suggested that mutual funds, even the better ones, do not perform as well as the index for all shares (used in table 10).

[25]Grove 1990 *THRHR* 28-42 discusses the difference between what he calls a 'nominal' and an 'effective' rate. I use the term 'nominal rate' in this thesis in the sense of what Grove terms the 'effective annual rate'.

[26]The formula I-R is a rough approximation of the correct ratio formula $(1+R)=(1+I)/(1+F)$ where F is the rate of inflation (see 99). This complication arises because the functions $1+I$, $1+R$ and $1+F$ are ratios. For more detail

of return of 20% per year compound with an inflation rate of 15% per year would be associated with a real rate of return of 4,3% per year.[27] The real rate of return includes a basic real rate of return on a minimum risk investment,[28] typically 2% to 3% per year, plus a premium for the effects of risk.[29] An increase to the discount rate of return reduces the associated present value. It follows that the deductions for general contingencies and the risk of death could be introduced by way of an increase to the discount rate of return.[30] In practice when assessing damages for personal injury and death it is usual to allow for risk, other than investment risk, by way of explicit percentage deductions separate from the discount rate.[31] Thus the risk of death is introduced actuarially by percentage deductions on a sliding scale applied on a year-by-year basis.[32] Other categories of risk are allowed for by way of a deduction for general contingencies.[33] The allowance by the courts for risk separately from the discount rate of return, has its origin in the early damages cases where the cost of purchasing a life annuity was used as the basis for the damages calculation[34].

[8.1.8] Risk of mortality: There is no reason why allowance for a risk such as mortality should not be included simply by using a higher discount rate of return.[7] Instances of such an adjustment are to be found: The MMF has, for instance, recommended that its agents use a net capitalization rate of 4% per year. This may seem to be excessive in relation to actuarial rates of 2% to 3% per year. However, the calculations done by fund agents often do not make explicit separate allowance for mortality in the same way as is done by an actuary. The higher 4% rate used by fund agents then gives much the same end results as those obtained by actuaries[8] because the actuaries include an additional discount for mortality. Similar comments apply to the high rates of 3% per year to 6% per year used by

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see Koch 'Damages' 74-6.

[27]If one uses the correct formula 1,20/1,15=1.043=1+R/100, ie R=4,3%.

[28]No investment is wholly free from risk, but some have lower risk profiles than others (see *Wright v British Railways Board* [1983] 2 All ER 698 (HL) 703c).

[29]The add-on for risk can be substantial: In *re Bird Precision Bellows* [1984] 3 All ER 444 (ChD) 457-8 the business was valued using a real rate of return of 26,66% per year compound; in *Buckingham v Francis* [1986] 2 All ER 738 (QBD) 742 a **real rate** of 25% per year compound was used.

[30]See table 11 at 161.

[31]For the general application of this technique in business and social analysis see Weston & Brigham 'Managerial Finance' 272-3; Mishan 'Cost-Benefit Analysis' 2ed 298-9; Pearce 'Cost-Benefit Analysis' 2ed 74-80.

[32]See paragraph 5.4.1.

[33]The deduction for general contingencies is not confined to risk but extends to other factors such as the costs of travelling to and from work and the deduction of income tax which had not originally been deducted.

[34]See, for instance, *Rowley v London and North Western Railway* [1861-73] All ER Rep 823 (Exch); *Phillips v London & South Western Rail* [1874-80] All ER Rep 1176 (CA) 1180-1; *Clair v PE Harbour Board* (1886) 5 EDC 311 316-17; *Smart v SAR&H* 1928 NPD 361 366; *Laney v Wallem* 1931 CPD 360 362 364.

[7]Grotius '*Inleiding*' 3.14.19-20 records that risk free investments are subject to a maximum rate of interest of 6,25% per year, but that higher rates are permitted on life annuities because of the attendant risk of death. *Gillbanks v Sigournay* 1959 2 SA 11 (N) 14H 'Mr Warner suggested that I should use 5 per cent and not worry about contingencies'. The actuary had discounted at 4% per year compound.

[8]Except when discounting over the expectation of life when the values calculated using 4% per year will usually be too low.

the courts *mero motu* when unassisted by an actuary.[9] The main danger with such an approach to mortality is that the court when using an actuarial calculation may not appreciate that in doing so it has already made adequate allowance for the contingency of early death and may then proceed to make a further unjustified contingency deduction.[10]

[8.1.9] Residual earning capacity: Compensation money in the hands of an entrepreneur may provide opportunities to generate income far in excess of what was possible had he not been injured. Typical of such victims is the labourer who uses his money to buy a taxi. If his injuries prevent him from driving it himself he can easily hire a driver. One can also imagine the victim who buys a caravan park or an hotel. Any adjustment to the discount rate of return on this account would be an adjustment for residual earning capacity.[11] If a widow takes up employment after the death of her husband the earnings from this source are ignored when assessing her damages.[12] The same principle will undoubtedly be applied to her successful use of an award for damages for loss of support.

[8.2] THEORY OF REAL RATE OF RETURN

[8.2.1] Net capitalization rate: The vast majority of damages assessments are not concerned with the absolute values of future inflation and future nominal rates of investment return.[13] The most important parameter[14] for the courts is the real rate of return and the associated net capitalization rate. The **real rate of return** needs to be distinguished from the **net capitalization rate** because the latter includes allowance for non-investment factors such as future salary escalation above or below the rate of inflation.[15] Although the real rate of return and the net capitalization rate are often numerically equal, this is not always so.

[8.2.2] Consistency between awards: The net capitalization rate is a matter of some

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[9]See table in Koch 'Damages' 331-3. Cases from 1966 onwards with actuarial input are recognizable by the separation of interest and inflation.

[10]See footnote 47 at 86.

[11]See paragraph 12.17.7.

[12]*Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A).

[13]The use of separate allowances for future inflation and investment returns is generally confined to actuaries (see, for example, *Bailey v Southern Insurance* 1981 3 C&B 178 (C) and the subsequent approval of this practice in *Southern Insurance v Bailey* 1984 1 SA 98 (A) 115-16; see too cases listed in Koch 'Damages' 332-3). In *Kotwane v UNSBIC* 1982 4 SA 458 (O) 468 one finds judicial notice being taken of the separation of the two components. A nominal rate of return is only needed when the cash flow to be valued does not increase in line with inflation. This arises most commonly with certain housing subsidies and pensions under retirement annuity plans.

[14]A parameter in applied mathematics is a linking common factor. The discount rate of return in this instance is not derived from observation of a market in earning capacities or lump-sum values for lost support, but by reference to a suitable surrogate market (see 26) such as the pricing of life annuities (see 113).

[15]In *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 60 68 the court allowed for future salary increases in line with inflation only every second year with one third of the rate of inflation for intervening years, an effective net capitalization rate of 4,5% per year. In *Brunt v AA Mutual Insurance* 1990 (W) (unreported 26.2.90 case 19198/87) the court ordered the use of a nominal discount rate of return of 15,5% per year coupled with a rate of salary escalation of 10,96% per year, that is to say a net capitalization rate of 4,1% per year. In *Standard General Insurance v Maluleka* 1976 2 C&B 579 (A) 582-4 the court allowed, with reservations, for future increments in excess of the rate of inflation. More generally see Koch 'Damages' 133-5.

considerable importance when assessing damages.[16] Considerations of concretization would suggest that each claim be assessed on the basis of available evidence. Available evidence in this context does not mean having regard to the personal investment idiosyncrasies of the claimant but to general investment considerations such as one might expect to be adopted by the reasonable man who is neither too cautious nor too reckless.[17] As I have observed this is an objective standard.[18] If the courts have regard to the historical record as a basis for predicting the future one might anticipate some degree of conformity between the net capitalization rates used for different awards. Some recent rulings[19] have rejected the historical record and the conventional wisdom of actuaries[20] and preferred what can best be described as a 'gut-feel'[21] approach in favour of a real rate of return of 1% to 1,5% per year compound. These 'gut-feel' assessments are nonetheless objective in that they have no regard for the claimant's personal opinions on the matter. The use of 1% per year would seem to have its origin in the practice of a prominent life office[22] which had taken to valuing its pension fund liabilities using this rate. The rate has been described as a conservative one and, in the life-office context, includes allowance for future increases in

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[16]R10000 per year over 20 years discounted at 3% py has a present value of R148775, at 2% py this becomes R163514, at 1% py R180456, at 0% py R200000. A court that adopted 0% py would arrive at a value for the damages 34% higher than a court using 3% py. If consistency between awards were of any importance then a standard rate for all claims should be used. Considerations of what is called the 'yield curve' (see 147) suggest that different discount rates should be used for different periods of loss. With damages calculations this refinement is generally ignored (see 147).

[17]*Todorovic v Waller* (1981) 37 ALR 481 (HC) 488 line 41'the rate should be that produced by reasonably safe investments - such investments as a prudent man in the position of the plaintiff, very much concerned to preserve his capital, but not overcautious, would make'; see too Fleming 1977 *AJCL* 51 64n76. Friedman & Savage 1948 *JPE* 279 284 'the probability is that the classes of investments which on the average return most to the investor are neither the very safest of all nor the very riskiest, but the intermediate classes which do not appeal either to timidity or to the gambling instinct'. *Sigournay v Gillbanks* 1960 2 SA 552 (A) 567G 'He said that he himself was accustomed to use 4 per cent but that he could not speak for all actuaries ...The actuary agreed that present day rates were substantially higher and that even for Government stock the rate was now 5,5 per cent or more. His evidence convinces me that by averaging out one could obtain 4,5%, still within the limits of practicably unassailable security over a long period'.

[18]See paragraph 8.1.3.

[19]*Oberholzer v NEG Insurance* 1988 4 C&B A3-1 (C) (1% per year); *Gallie NO v NEG Insurance* 1992 2 SA 731 (C) (1,5% per year) 'I do not, however, consider myself bound by the conventional wisdom prevailing in the actuaries profession at the present time' (2,5% per year); *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 60-4 (1% per year). Contra *Brink v The MVA Fund* 1991 (C) (unreported 2.8.91 case 6038/89) 2,5% per year; *Ngubane v SATS* 1991 1 SA 756 (A) 781E 'the actuary, having regard to inflation and capitalization of the award, used a nett capitalization rate of 3% per annum compound'.

[20]Martens (1987) surveyed discount rates being used by actuaries active in compensation work in South Africa. This revealed net capitalization rates with 7 replies falling between 2% and 3% per year, 3 above this range and 2 below this range. A survey by my office at March 1987 of rates used by 5 major life offices to price increasing annuities certain revealed nominal rates ranging from 16,6% per year to 17,4% per year. The 20-year bond index for 1987 averaged 15,4% per year, 1,4% per year below what life offices were prepared to guarantee. If a real rate of return of 2,5% per year was implicit to the 20-year bond index then the life office rates implied a real rate of return of 3,9% per year. See footnote 66.

[21]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 114D.

[22]Old Mutual. See next footnote.

salaries at rates above the rate of inflation.[23] The use by some courts of low rates of 1% to 1,5% per year is sporadic and higher rates are also in use[24] depending on which actuaries give evidence. There is certainly no general rule in this regard. Actuaries favouring the lower rates would seem to be very much in the minority.[25] There are substantial difficulties with fixing a real rate of return by reference to evidence. Even-handed justice and forensic efficiency would be best achieved by laying down a fixed standard real rate of return in the rules of court.[26]

[8.2.3] Good times and bad times: Considerations of hypothetically consuming interest and capital over a stated period of time casts the calculation into the contingency-fund mould[27] and can give rise to inappropriate margin building when pricing compensation for a single claimant.[28] Thus, for example, the failure of the defendant to offer compensation by instalments was held to cast onto the claimant the risk that inflation may exceed investment returns over an extended period of time.[29] It is of note in this regard that no life insurer in South Africa is prepared to issue a life policy which guarantees that benefits will increase in line with inflation. The reason for this lies in the contractual nature of a life office's obligations. A claimant who is faced with poor investment conditions can lower his standard of living or defer certain expenditure, as he would have done had he not been injured and had difficulties with his job. A life office does not have the same flexibility, it cannot reduce policy benefits which are contractually guaranteed.[30] The *quid-pro-quo* for the claimant who is faced with adverse investment returns is the prospect that if investment returns are far better than expected he can increase his standard of living. The real rate of return used for discounting the award, if fair to both claimant and defendant, would balance the down-side chances against the upside chances.

[8.3] INVESTMENT INDICES

Personal expectations of the real rate of return are not readily measured. Prevailing financial indicators in South Africa provide us with a few rough guides: The consumer price index,

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[23] *Brink v The MVA Fund* 1991 (C) (unreported 2.8.91 case 6038/89) 'Mr Cartwright was of the opinion that a discount rate of 1% ought to be used, but this was based on what he readily conceded to be the "cautious" and "prudent" approach adopted by insurance companies (by one which he was employed)'. This 1% per year rate is used by the pensions department at Old Mutual to value pension-fund liabilities and includes allowance for future real increases in the salaries. With compensation calculations it is usual to make explicit allowance for real increases, if any. The use of a 1% per year rate can thus lead to double compensation.

[24] *Brink v The MVA Fund* 1991 (C) (unreported 2.8.91 case 6038/89) 2,5% per year; *Ngubane v SATS* 1991 1 SA 756 (A) 781E 3% per year based on actuarial evidence.

[25] See footnote 20.

[26] See 144.

[27] See 106.

[28] See footnote 23.

[29] *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 64; the court elsewhere (at 66) noted the contingency that investment returns might substantially exceed the rate of inflation. See too *Smith v SA Eagle Insurance* 1986 2 SA 314 (C) 318-19 'I must also *inter alia* weigh the possibility that the investment of the award might achieve a return greater than the inflation rate against the possibility that the converse might occur'. The court then made a deduction of 20% for all contingencies including the investment issue.

[30] Most life offices offer benefits which increase in line with investment returns.

the yield index and the dividend yield. These are now discussed in greater detail:

[8.3.1] The consumer price index: The consumer price index as published by the Department of Statistics, despite its many weaknesses,[31] is generally accepted as a fair reflection of the rate of inflation.[32] Because of its high credibility it gives rise to a degree of self-fulfilment.[33] Personal beliefs as to the rate of inflation will find expression in price and salary increases which will in turn determine the level of the index. There are a number of other indices such as the GDP deflator and the retail price index. In an active economy these indicators, along with the consumer price index, are all expected to give the same average values over an extended period of time.[34] There are a number of papers on inflation in relation to damages awards[35] but these will not be discussed further here because they proceed from the unsound premise that the award can be used by consuming interest and capital to replace the lost income.

[8.3.2] The dividend yield: The closest we can come to a direct measure of the real rate of return is to observe the dividend yield on the FT-Actuaries index for stock exchange prices.[36] This averages the yields on numerous different shares and reflects the dividend return obtainable if a portfolio was held which matched the shares making up the index. The historical analysis in table 10A[37] suggests that over periods of 15 to 20 years the overall return, capital growth and dividends combined, will exceed the dividend yield at the beginning of the period by about 2% per year.[38] If one accepts this observation as a predictor for future share-market returns in South Africa then a current dividend yield of 3% per year indicates an average real rate of return over the next 15 to 20 years of 5% per year compound above the rate of inflation. A small reduction may need to be applied to allow for taxation.

[8.3.3] The yield index: An index is published daily in the South African financial press

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[31]The popular financial press includes numerous tilts at this all-too-conspicuous and potentially fallible index. The fact remains that it is the best general price index that can be achieved within the practical limitations of economic and demographic research. For a recent well balanced discussion see *Farmer's Weekly* April 16 1993 11 (Havinga). The Department of Statistics provides numerous subindices focusing upon select areas of expenditure. The building trade has developed its own special index (the Haylett formula).

[32]1985 *Finance Week* 31.1.85-6.2.85 152 'While noting their reservations, economists generally seem fairly satisfied by the cpi's reliability. "It's the best indicator that's available and I have no hangups about using it," concludes Falkena'; see too Corbett & Buchanan vol 4 at lxiv.

[33]'The prices of *existing* assets will always adjust themselves to changes in expectation concerning the prospective value of money' Keynes 'The General Theory' 142 .

[34]For the same reason, the index is not very sensitive to the weightings used for the different classes of expense (Osborn *Business Day* 10.9.91 8).

[35]See, for instance, Spandau 1975 *SALJ* 31; Fleming 1977 (26) *AJCL* 51.

[36]3,3% per year at April 1992.

[37]At 122.

[38]See analysis in table 10A at 122.

showing the average yields on an aggregated portfolio of fixed-interest stocks[39] issued by government[40] and other corporations. Yields are published for terms to redemption of 1 to 25 years. The index record commences at 1960. Prior to the introduction of this index the heavily traded stocks issued by Escom served as a substitute for a formal index. The significance of the index is that it gives some guidance as to prevailing investor expectations on long-term investment returns. If the South African investment market was efficient[41] then the long-term yield would be in equilibrium with other forms of investment, such as the stock exchange and the property market, and would give an accurate guide to expected minimum-risk returns for all classes of investment. One suspects that the South African market is by no means as efficient as the markets in London and Tokyo.[42] We may safely assume, however, that a reasonable degree of investor choice is reflected in the pricing of fixed-interest stocks[43] and that the yield index, although not accurate to the second decimal place, does provide a fair indication of minimum[44] long-term yield expectations by the market. It is certainly sufficiently accurate for the very approximate calculations required by the courts for assessing damages. The main problem is that the index gives a nominal rate of return and not a real rate of return. The expected level of future inflation implicit to the index is thus not immediately apparent. For tax reasons the purchasers of fixed-interest stocks are largely investors who are not liable for tax on the interest receipts.[45] Thus for practical purposes the yield may be viewed as gross of taxation,[46] that is to say

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[39]A stock is a negotiable security which, in its most common form, promises to pay a fixed amount, the face value, at the end of the investment term, perhaps 20 years, with fixed interest payments every six months calculated on the face value. As market interest rates go up and down the price at which these securities are traded will fall below or rise above the face value. The yield to redemption, the internal rate of return, includes the value of the difference between price paid and redemption value.

[40]Spandau 1975 *SALJ* 31 46 records that the prices of government stocks are artificially increased by reason of prescribed asset requirements, that is to say the yields are artificially reduced. This restriction on the investments of life insurers and pension funds was removed early in 1989. The yields on long-dated stocks then moved upwards by about ½% per year but ended the year on the same level as they began.

[41]That is to say that if all investors were well informed as to a wide variety of alternative investment opportunities and were able to switch their investments to take advantage of that information **then** the market prices for different investments would relate to one another in a rational manner. In practice all markets are inefficient to a greater of lesser degree and thus exhibit a certain degree of irrationality. It should be borne in mind, however, that even a fairly inefficient market will be substantially more efficient than a court of law.

[42]A market with poor information transfer, and associated pricing anomalies, provides numerous opportunities for bargains for perceptive investors. For a highly critical discussion of conventional views on market efficiency see Clarkson & Plymen 'Improving the performance of equity portfolios' 1988 *JIA* 631 634-6 660-3.

[43]Kantor reproduced in Koch 'Damages' 244-5 'All participants in financial markets have much to gain from estimating the inflation rate correctly. Therefore, the current market long-term interest rates implicitly reflect the consensus of financial opinion about the average rate of inflation expected over the next 20 years'. Keynes 'The General Theory' 142 'The prices of *existing* assets will always adjust themselves to changes in expectation concerning the prospective value of money'.

[44]See paragraph 8.3.12.

[45]Pension funds are major investors who are not liable for tax on interest. Life offices do not pay tax on interest receipts associated with retirement annuity and immediate annuity business. Until recently non-residents were substantial investors in government stock. They paid a flat 15% withholding tax on the interest payments with the balance being remittable overseas, an attractive opportunity to withdraw substantial funds from South Africa.

[46]If all investors experience the same tax liability in relation to an investment then that liability will be reflected in the market value at which such investments are exchanged.

investors can be expected to arrange their affairs to minimise liability for taxation.

[8.3.4] Consumption of capital: The ballooning of investment funds[47] will for many years, if not indefinitely, ensure sufficient funds for living off dividends and rentals alone. After prolonged periods of time (20 to 40 years) it may become necessary to sell some investments. This may well be achieved by the opportune switching to investments which provide more income and less capital growth, such as property trusts and syndication schemes.[48] Immovable property cannot be sold in small quantities and will usually be retained either for rental income[49] or as owner accommodation. The notion that a plaintiff should consume interest and capital over his lifetime suggests that even the immovable properties must be sold in order to ensure total consumption of assets at the date expected for death at the time of the trial. This is unsound as an investment strategy. In the absence of injury or death many families will accumulate savings, usually in the form of a family home, but also through endowment policies, pension funds and other planned savings. The award of a capital lump sum has the result that these savings plans are fulfilled many years ahead of schedule. By paying cash for the home the family is relieved of bond repayments. The family car can be purchased for cash instead of on lease. Freedom from the burden of interest or lease charges are investment advantages which do not attract taxation.

[8.3.5] Expectations and outcomes: Reliance on the yield index does not imply that investment should be made in the assets measured by the index. Investment in fixed-interest stocks should, as a general rule, be avoided by compensated victims and dependants. Thus, for instance, a 25-year investment bought in 1975 would have guaranteed a yield of 9,5% per year compound.[50] A fair rate of return at the time of purchase but, with hindsight, hopelessly inadequate in relation to the average inflation rate of 13,9% per year which has prevailed since 1975.[51] This example emphasises the risks attaching to seemingly safe fixed-interest investments. Only investments such as share market equities and immovable property have provided returns since 1975 in excess of the rate of inflation. 9,5% per year compound nonetheless was a fair nominal rate in 1975 **for discounting future losses**. This is what Pepper has in mind when he states that:

> 'Economists tend to focus on the rate of interest at the start of a transaction, more precisely on the *expected* real rate of interest, ie on a nominal rate of interest less the expectation of inflation over the relevant term. The expected real rate of interest influences decisions to invest, eg to build a factory, and decisions to save. Actuaries are more interested in the *realised* rate of interest at the end of a transaction, ie the

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[47]See 101.

[48]Such schemes usually involve holding shares and loan accounts in a company which owns a substantial commercial or industrial property. These schemes give the small investor access to large-scale property investments.

[49]Property neglect in later years will have the short-term effect of increasing cash income whilst depreciating the underlying asset.

[50]Assuming consumption of income receipts or reinvestment at the original guaranteed rate.

[51]If income receipts had been invested at the higher returns that have since been obtainable this would have increased the overall yield above that notionally obtainable when the investment was purchased.

nominal rate of interest less actual inflation over the relevant period.'[52]

This passage states that the returns **expected** at present are one thing, but that the actual returns that will be achieved are something quite different. It also states that decisions to invest are based on present expectations and not eventual outcomes. In the next paragraph I discuss Keynes' concept of a 'barometer' of investment levels.

[8.3.6] 'Barometer' of prevailing investment conditions: A claimant who was compensated in 1975 was able to invest the money into a market where business was conducted on the basis that future long-term yields would be 9,5% per year. Hindsight tells us that there were ample opportunities to profit from the low level of yields in 1975. For instance had the claimant used the award to pay off the mortgage bond on his house he would have been spared the cost of subsequent increases in bond rates. The prices of share market equities and property were all very much lower in 1975 than they are today. The long-term yield of 9,5% per year in 1975 was not a prediction of what interest rates would be but a measure, **a 'barometer'[53] of investment opportunities at the time that the award was made.** It was a fair and proper basis for comparing investments in 1975. The victim who claims damages is required to accept a single lump sum in lieu of contingent future earnings and expenses. He then has cash which he can invest into a market where investment opportunities are being traded in anticipation of future investment returns of 9,5% per year. It is submitted that if fairness is to be achieved the award that is made for damages should have regard to the state of the market at the time that the award is made. That lump-sum award, I have argued,[54] is the **price** that the wrongdoer pays as financial equivalent for what has been lost. The point I here seek to make is that it is a price of the same nature as the price that would be paid to purchase shares on the share market or immovable property or, if one wanted it, a long-term fixed-interest investment.[55]

[8.3.7] Dispute resolution amongst actuaries: In their normal activities life-office and

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[52]1984 *TFA* 145 146. Collings 1982/83 *TASSA* 119 128-9 makes the same point when he states that 'Sometimes it is hard to understand why we spend so much time trying to devise plausible alternatives to market value. After all it is as far as is possible objective (ie independent of the opinions and methods of the valuator) ... Personally I would hate to be accused of pretending to be wiser than the market'. See too Brown (presidential address) 1985/86 *TASSA* 604 605 'We have often observed the dangers resting in our mystique. Many clients see the financial importance of their pension fund. They are puzzled by the underlying actuarial valuation assumptions, which seem to have little bearing on the assumptions they would make in their business activities'. In *Brink v The MVA Fund* 1991 (C) (unreported 2.8.91 case 6038/89) the court rejected a 1% per year net capitalization rate on the grounds that it reflected life office conservatism.

[53]Keynes 'The General Theory' 151.

[54]See chapters 2 to 6.

[55]'The considerations upon which expectations of prospective yields are based are partly existing facts which we can assume to be known more or less for certain, and partly future events which can only be forecasted with more or less confidence... our usual practice (is) to take the existing situation and to project it into the future, modified only to the extent that we have more or less definite reasons for expecting a change... The actual results of an investment over a long term of years very seldom agree with the initial expectation' Keynes 'The General Theory' 147-52 (emphasis supplied).

pensions actuaries[56] are seldom concerned with the pricing of financial instruments with a view to immediate re-investment in the wider market. One notable exception in this regard is the pricing of immediate annuities,[57] and then only when the life office wishes to be competitive.[58] Having regard to the tendency of some actuaries to use artificial discount rates for financial management purposes,[59] it is notable that the professional guidelines for actuaries emphasise the need to have regard to market rates of interest when calculating the value to be placed upon transfer values[60] for the transfer of the savings[61] of a pension-fund member to another pension fund. This directive ensures that a common standard of value is applied when calculating the transfer values, despite different actuarial bases for the normal financial management of the various funds involved.[62] Pension funds generally invest part of their funds in growth investments such as share-market equities and immovable property. The yield to redemption on fixed interest investments thus also serves as a benchmark for the yields expected on other investments. The directive permits an actuary to deviate from the market rate if a future reinvestment risk[63] is perceived as being of material proportions. One suspects that such a discretion would only be exercised when discounting is being done over fairly short periods up to 10 years.

[8.3.8] Surrogate markets: If the damages assessment process were perceived as setting a fair price in exchange for what has been lost then we could describe the pricing of fixed-interest stocks, and the associated yields, as a 'surrogate market'[64] which enables the court to establish a market related value, that is to say a fair value, for what has been lost. The yield index[65] commends itself for this purpose for a number of reasons: First and foremost

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[56]There are some actuaries who specialise in trading investments rather than the setting of insurance premiums and ensuring the solvency of the fund.

[57]See discussion of this topic at 117.

[58]For various reasons a number of life offices do not wish to compete for immediate annuity business.

[59]That is to say when setting premiums and testing the solvency of a fund. For this purpose the artificial rates are quite satisfactory.

[60]Faculty of Actuaries Members' Handbook paras 3.1 3.2 'One of the ways in which a market value assessment may be made is on the basis of market redemption yields on British Government Stocks of appropriate duration and type at the time of transfer with allowance for investment of future interest receipts as the actuary considers reasonable'. The point made by Pepper (see quotation at 135 above) is that here-and-now economic decisions assume that future interest receipts will be at the yield rate. The award of damages is a once-and-for-all here-and-now decision. The victim cannot come back later and ask for more money; the defendant cannot claim back surplus funds (see chapter on Contingency Funds at 106).

[61]I use the word 'savings' here for the benefit of legally trained persons. Actuaries would not view these amounts as savings but rather the present value of the member's prospective rights to a pension and future lump sum payment.

[62]Dissolution of a pension fund on the insolvency of an employer may result in transfer values going to several different funds as the employees find employment at different places. In South Africa the law does not prohibit the payment of a transfer value directly to the member.

[63]Re-investment of interest receipts.

[64]Pearce 'Cost-Benefit Analysis' 2ed 9-13 discusses the problem of estimating consumer willingness to pay when there is no market in the commodity whose value needs to be determined. A notional market price is then estimated by reference to a 'surrogate market' with suitable parallel characteristics. See *Todd v Administrator, Transvaal* 1972 2 SA 874 (A) 885D for an example of judicial pricing by reference to a surrogate market.

[65]See 133.

it is readily ascertainable. Secondly it offers more than adequate accuracy for the fairly rough and ready requirements of a court.[66] Thirdly actuaries have close regard to this index when setting the prices at which they will issue immediate annuities.[67] The long-term yield in the surrogate fixed-interest market provides a common valuation parameter just as for business premises the rental per square meter is commonly used to compare the rents of premises of different sizes.

[8.3.9] Compensating errors: The long-term yield will include full allowance for prevailing investor perceptions of future fluctuations in interest rates. This allowance is by way of an add-on to the yield, the so-called liquidity premium.[68] The higher the yield the lower the market value. The risk of fluctuations thus gives rise to a reduction in market value. Judicial reasoning has been quite the reverse. Thus in one instance one finds a **reduction** in the discount rate of return to allow for the disutility of anticipated fluctuations.[69] This is an example of the general theorem that the present utility of an expected value subject to uncertainty is always less than or equal to the expected value as a certainty.[70] Similar considerations explain why the allowance for general contingencies is almost always a deduction.[71] The reduction in the discount rate of return leads to an overstatement of the capital value. This is then, it seems, compensated by an over-deduction for general contingencies. An extreme example of this process is to be found in *Kotwane v UNSBIC*[72] where the court applied a contingency deduction of 60% to a capital value obtained by discounting at the very low rate of 5% per year against wage escalations of 12% per year.[73]

[8.3.10] Importance of nominal rate of return: In practice the expected real rate of return is of far greater financial importance than the yield on long-dated fixed-interest stocks. The expected long-term yield is nonetheless relevant: Firstly it provides a bench mark from

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[66]In practice the expected real rate of return is far more financially important. The survey of actuarial bases by Martens (1987 - see footnote 20) revealed gross discount rates ranging from 8,5% per year to 15,5% per year at a time when the long-term stock yield was ranging between 15% to 16% per year. With such wide divergences of actuarial opinion it is clear that errors in the yield index of ¼% to ½% are insignificant by comparison. A survey by my office at March 1987 of yields on increasing immediate annuities certain issued by 5 life offices revealed gross discount rates ranging from 16,6% per year to 17,4% per year (a repeat survey in 1991 revealed similar rates). This very much narrower range suggests that the life office actuaries had seriously applied their minds to the problem whereas the consulting actuaries had not. The annuities were to be contractually increased by 13,2% per year compound.

[67]See, for instance, Gratton 'Immediate Annuity Business in Australia' 1985 (unpublished - at page 43 of the discussion paper)

[68]Pepper 1984 *TFA* 145 147.

[69]The minority judgment in *Sigournay v Gillbanks* 1960 2 SA 552 (A) 587F 'It seems clear that the current rate of interest is not the proper rate for calculating the capital value of a future income over a long period. As was pointed out in the evidence, interest rates fluctuate'.

[70]'... the utility from a benefit that occurs with certainty is greater than the utility that comes from the expected value of a benefit... this is the same as inserting the expected value of the benefit and deducting the "cost of risk bearing"'Pearce 'Cost-Benefit Analysis' 2ed 79. See 157 below.

[71]See 157.

[72]1982 4 SA 458 (O).

[73]The court had refused to allow actuarial evidence to be led.

which to measure the real rate of return. Secondly the expected long-term yield provides a paradigm which gives a clearer insight into how we discount future losses. Thirdly the expected long-term yield is the relevant net capitalization rate when the future cash flows do not increase to offset inflation, as with some home loan subsidies and some pension benefits. The expected long-term yield is also relevant in the determination of the net capitalization rate when increases in future payments will only partly offset the effects of inflation as with most pensions, particularly those provided by the Workmen's Compensation Commissioner.[74] An actuary who adopts a nominal discount rate below the market rate will usually[75] place too high a present value[76] on future payments which are expected to escalate at rates below the rate of inflation.

[8.3.11] Reliability of long-term fixed-interest yield index: Despite its rejection in *Sigournay v Gillbanks*[77] the current long-term yield has not been entirely disregarded.[78] The main objection to using a current rate is that a court might fall into the trap of using a nominal rate without a compensating adjustment for future inflation.[79] This would lead to too high a net capitalization rate with a consequent understatement of the capital value. That such fears are well founded is documented by the Australian experience.[80] An objection which has been raised against using the current long-term yield is the observation that future interest rates will fluctuate.[81] This objection is, however, without foundation because the market rate includes the market's allowance for the prospect of fluctuations. The tendency of the courts is to reduce the discount rate of return for the prospect of fluctuations. The market's allowance for fluctuations will be to add a margin for risk, that is to say to increase the rate of return. The overall effect is that the one adjustment tends to cancel out the other.

[8.3.12] Mixed investment portfolio: Having thus far concentrated on the long-term stock yield it is as well to recall that what is really required is a guide to the general level of expected future returns on a mixed portfolio comprising a variety of investments (including

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[74]These are increased at about 40% of the rate of inflation (Koch 1987 *THRHR* 475 479).

[75]I say 'usually' because some actuaries make special adjustments to compensate for their use of an unduly low nominal discount rate of return.

[76]Compared to other investments available at the time.

[77]1960 2 SA 552 (A) 567 587.

[78]Fabian has stated that: 'The most important area is that of interest and inflation. The author fixes the interest rate as the long-term rate on Escom stock and he chooses the CPI for inflation. I have no argument with either of those' Koch 1982/83 *TASSA* 78 104.

[79]*Andrews v Grand & Toy Alta Ltd* (1978) 83 DLR (3d) 452 (SCC) 471-2 'One thing is abundantly clear: present rates should not be used with no allowance for future inflation. To do so would be patently unfair to the plaintiff. It is not, however, the level of inflation in the short term for which allowance must be made but that predicted over the long term. It is this expectation which is built into present interest rates for long-term investments'.

[80]Luntz 'Damages' 2ed 319 'Murphy J drew attention to the injustice to plaintiffs that was being perpetrated by ignoring future wage increases while discounting at comparatively high rates of interest'. The problem was subsequently removed by the ruling in *Todorovic v Waller* (1981) 37 ALR 481 (HC) that a rate of 3% per year compound be used in all instances.

[81]*Sigournay v Gillbanks* 1960 2 SA 552 (A) 587F; Cooper-Stephenson & Saunders 'Damages in Canada' 264.

immovable property and stock exchange equities). Fixed-interest stocks are perceived[82] to have a low risk profile. For this reason the associated yields will generally be lower than for other forms of investment. It follows that the yield index may be viewed as a guide to a **minimum** expected level of return for a mixed portfolio. Tax liability depends on the mix of investments selected for the portfolio. Fixed-interest investments are generally heavily taxed and will thus be avoided by most portfolio managers except for the temporary harbouring of surplus funds. Small amounts of interest are tax free.[83] The capital growth on equities is tax free provided one does not buy and sell so actively as to qualify as a 'trader' for tax purposes. Immovable property is subject to tax only on net rental after deduction of expenses, and provides tax-free accommodation for an owner-occupier.[84] The value of immovable property, can be expected to increase more or less in line with inflation.[85] Rentals on residential property are expected to be about 6% to 8% on value before deduction of property taxes and maintenance costs.[86] Such rental statistics as are available indicate increases about 1,5% per year below the rate of inflation.[87] Considering the low level of the rentals revealed by the survey[88] the low rate of increase may well reflect subsidised housing for persons of low income. One suspects that a survey of the rentals paid for higher priced residential properties, and business premises, would reveal rentals that increase, with leads and lags, in line with inflation. Social-welfare housing is not a recommended avenue for private investment.

[8.3.13] Fixed-interest investment involves high risks: Under conditions of high inflation fixed-interest deposits of short to medium term assume a very high risk profile indeed. This will in many cases be higher than that attaching to good immovable property and share market equities. The explanation for this is as follows: When interest rates are low, say 4% per year, the ratio of total interest receipts over 25 years to capital invested is roughly 1 to 1. When interest rates are at 16% per year the ratio rises to 4 to 1.[89] Although the original nominal capital may be guaranteed, the rate of interest, the major portion of the investment, is not guaranteed. If the interest rate is guaranteed, as with long-dated stocks, then the interest risk is replaced with fluctuating values for the original capital invested.[90] As has

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[82]The risk of default is very low but the risk of fluctuations in value is high. Many investors perceive risk in terms of preservation of nominal capital rather than preservation of real capital. This leads to overrating the security of fixed-interest investments. For long dated fixed-interest stocks the risk of fluctuations will often lead to a reduction in the market price of the stock, and thus in a higher yield, ie internal rate of return.

[83]R2000 for 1992/93 tax year per ss10(1)(i)(xv) and (xvi) of Income Tax Act 58 of 1962 (as amended).

[84]This reflects the consideration that persons with capital, unlike wage earners, are in a good position to take advantage of tax shelters (*Beach v Reed Corrugated Cases* [1956] 1 WLR 807; McGregor 'Damages' 14ed 322).

[85]*TRENDS* 3 1991 30 gives an index for house prices which indicates that over a 10-year period to 1990 prices have kept pace with the rate of inflation. Houses bought 15 years ago have fallen behind inflation by 1% per year.

[86]Squire 'SA property & the valuer' 29-33.

[87]CSS News Release of 10.4.90 indicates that flat rentals have increased over the 10 years 1979 to 1989 by 1,5% per year below the rate of inflation.

[88]CSS News Release of 10.4.90 indicates, for example, R358 per month in 1989 for a 3-bedroom unfurnished flat, that is about R540 per month in 1992 if escalated in line with inflation.

[89]And would be higher still if allowance were made for compounding.

[90]See 136 for a discussion of the effect of inflation persistently exceeding the guaranteed rate of interest.

been discussed above large fixed-interest deposits are subject to the additional risk of heavy taxation compared to share market equities and immovable property.

[8.4] QUANTIFYING THE REAL RATE OF RETURN

[8.4.1] Estimates: If the yield index shows 16% per year for 25 year stocks and the dividend yield is 3,2% this suggests[91] that inflation is expected to average roughly 12,4% per year in the long term.[92] Traditionally fixed-interest investments have been viewed as having a lower risk profile than equities and immovable property. This conventional wisdom would give rise to a lower expected real rate of return for fixed-interest investments. One might guess this real return for this class of investments to be somewhere between 1% per year and 2,5% per year implying expected future inflation of between 13% and 15% per year. This expectation was appropriate in 1992. In 1993 the long-term yield index for fixed-interest stocks had dropped to 15% per year. Expected future inflation is thus 12% to 14% per year. There is an undemonstrable suspicion that in South Africa the pricing of long-term fixed-interest stocks is based on investor expectations of a real rate of return of about 2,5% per year.

[8.4.2] Anomalous investor preferences: During times of high inflation real long-term rates of interest are generally lower than during times of low inflation.[93] This is an odd phenomenon because inflation increases the risk attaching to the investment, and one would expect investors to demand a higher real rate of interest during times of high inflation. The explanation is probably that with the higher interest rates, and associated greater volatility, there is less demand, relative to the money supply, for borrowings with a consequent weakening of the lender's negotiating strength. The fact that many investors in fixed deposits continue to accept the lower real rate of return suggest substantial investor conservatism, a preference to stay with poor returns on a familiar form of investment.[94] It has been noted that investors tend to be either too conservative or too reckless.[95] The middle-path investments which offer the best returns relative to the risks involved are generally considered too risky by risk-averse people and too dull for entrepreneurs.

At a technical level one may note that there is a difference between the apparent real rate of return and the true effective real rate of return, and that the true real rate of return reduces as the rate of inflation increases. Suppose, for example, that an investor seeks an apparent

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[91]This is no more than a superficial impression. The analysis of share equity returns in table 10A at 122 suggests that expected returns on this type of investment are about 2% per year higher than the dividend yield, ie 5,2% per year (3,2%+2%).

[92]Using the ratio formula (see 99).

[93]Kantor as published in Koch 'Damages' 244 245. See too the graphs in Pepper 1984 *TFA* 145 148 151. Pepper 146-50 qualifies his forecast of real rates of 3,25% to 3,5% per year with the assumption that 'there will not be a continuing rise in the rate of inflation, ie that the UK will not become a banana republic'.

[94]Newdigate & Honey 'MVA Handbook' 168 maintain that 'the plaintiff could only be asked to place his capital in a safe and steady investment, which would normally produce a lower rate of interest than would an investment with more risk attached to it'. This echoes the now dated criterion of 'unassailable security over a long period'; *Sigournay v Gillbanks* 1960 2 SA 552 (A) 567G. Anderson 'Actuarial Evidence' 28 notes that a preference for bank deposits can lead to a loss of investment returns equal to a loss of half the capital.

[95]Friedman & Savage 1948 *JPE* 279 280 284.

real rate of return of 2,5% per year above the rate of inflation. If inflation is 5% per year then he will ask for a return of 7,5% per year. His true effective real rate of return is then 2,4% per year.[96] If, however, inflation rises to 15% per year then he will look for a return of 17,5% per year. His true effective real rate of return will then have dropped to 2,2% per year[97] by reason of the increased rate of inflation. The observed fact that the real rate of return reduces with increasing rates of inflation may be cited as evidence that the market focuses on the apparent real rate of return and not on the true effective rate.

[8.4.3] Measurement of liquidity premium: Analysis of historical real rates of return has generally been by way of a comparison between the long-term yield and the current rate of inflation.[98] This seems *prima facie* to be unsound procedure in that it involves a comparison between 'apples and pears'. The procedure is sound, however, because it involves two stages rolled into one: Firstly a comparison between the current rate of inflation and short-term interest rates, usually 3 months or less; secondly, an analysis of the interest premium for long terms, that is the additional yield required by investors for the greater risks attaching to the extended period of exposure to risk.[99]

[8.4.4] Results of studies: Examination of interest and inflation rates in the United Kingdom over the period 1824 to 1983 has led Pepper to expect a real rate of return in the long term of 3,25% to 3,5% per year before tax on fixed interest investments.[100] The period examined includes a number of major wars, the great depression, and the rise of communism. Kantor[101] after comparing historical yields on Government long-term stock with the associated rates of inflation expresses the opinion that South African real rates will average between 1% and 3% per year over periods of 15 to 20 years. Yields on long-dated Escom stock have averaged 0,7%% per year more than Government stock over the years 1960 to 1991.[102] The yield guaranteed on 'increasing annuities certain' sold by life offices in South Africa has exceeded the Escom yield by about 1% per year.[103]

The above analyses have all focused on fixed interest investments and have no regard to the effect of income tax. These considerations do not invalidate the analyses if one accepts that the returns on fixed interest investments provide only indirect evidence of the investment

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[96]1,075÷1,05=1,024.

[97]1,175÷1,15=1,022.

[98]Kantor as published in Koch 'Damages' 244 245; Gibson 1978 8 *MLJ* 637 650-1; Anderson 'Actuarial Evidence' 30; *Todorovic v Waller* (1981) 37 *ALR* 481 (HC) 512-13.

[99]Pepper 1984 *TFA* 145 147 'My preferred approach is, first, to examine the history of *short*-term real rates and, secondly, to investigate the liquidity premium, ie the difference between short- and long-term *nominal* interest rates'.

[100]Pepper 1984 *TFA* 145 150.

[101]Published in Koch 'Damages' 244 245.

[102]See table 10B at 123.

[103]Based on a survey by my office conducted in March 1987. Replies were received from 5 life offices to a request for the price to issue a contract for R500 per month increasing at 13,2% for a fixed period of 25 years. The Escom yield at March 1987 was 15,7% per year compared to a 17,0% per year average yield for the annuities certain. A repeat survey in 1991 yielded similar results.

returns available generally on a very much wider range of investments, that is to say serve as an index of investment conditions. As I have already noted fixed-interest investments per se are only attractive to persons who incur little or no tax liability, such as pension funds, banks and investors of relatively small sums of money.

It has been said that the real rate of return proposed by actuaries for assessing compensation matters has been decreased over the last 30 years 'from 5 per cent to 4 per cent to 3 per cent and now, the majority, to 2,5 per cent'.[104] This trend, it has been argued, suggests that further decreases may be prognosticated for the future. There is little doubt that actuarial credibility as experts on the real rate of return is called into question by this trend. In fairness to actuaries, however, it should be borne in mind that the higher rates of 5% and 4% per year were nominal rates before allowance for future inflation.[105] Economic theory suggests that if there is to be any motivation to save then the **expected** real rate of return must be greater than zero by a sufficient amount to make saving attractive as compared to immediate consumption of the capital. Low investor confidence for the future, such as prevailed in South Africa in 1992 and 1993, will generally give rise to reduced asset values, that is to say good long-term investment opportunities. Economically difficult periods such as the great depression have historically not lasted for extremely long periods compared to the 20 to 50 years generally required for damages calculations in respect of personal injury and death.[106]

One would also like to think that consistency between different awards is an important consideration.[107] General consensus as to the real rate of return is essential to achieving such consistency. If one accepts the view proposed in this thesis that an award for damages is no more than a fair price for what has been lost, that is to say the lump-sum award is not the means by which to replace the lost income but merely a substitute for it, then it becomes evident that actual investment returns are not as important as the discount for delay that claimants' are prepared to accept now for immediate payment in lieu of the uncertain prospect of some future financial accrual or expense.

[8.4.5] 2,5% per year real return: The above considerations suggest that the expected real rate of return net after tax on a mixed portfolio substantially exceeds 1% per year and may well be as high as 4,5% per year. A middle path view would thus be about 2,5% per

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[104]*Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 62 (per actuary Munro).

[105]In other words they were nominal rather than real rates. Until the ruling in *Bailey v Southern Insurance Assn* 1984 1 SA 98 (A) it was still arguable in court that allowance for future inflation was speculative and thus to be ignored. Rulings such as *New India Assurance v Naidoo* 1950 (A) (unreported 19.5.50) allowed for future wage escalation but would seem to have been ignored in the debate, possibly due to non-publication.

[106]For a man aged 40 the standard actuarial calculation will be taken to age 99, that is to say over a period of 59 years. The expected age at death would be about 65, that is to say some 25 years in the future. When analysing investments periods of 20 years or more in the future would generally be classed as being of very long term.

[107]In *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 63 the court dismissed as irrelevant the general consensus of the majority of actuaries and the fact that their opinion had remained unchallenged. This was effectively a rejection of the normal basis used to assess damages.

year.[108] This presumes that the investor seeks professional advice from a reputable organisation. For larger sums the money to be invested might be split equally between two and possibly more investment managers with a view to making performance comparisons. Extended investment in fixed-interest stocks or deposits will generally be avoided. For small sums of money[109] immediate life annuities with increasing instalments provide an attractive investment medium.[110] Every effort should be made to avoid investment in the Guardian's Fund.[111] By far the greatest investment risk faced by a compensated victim is the choice of a suitable investment advisor.[112]

The MMF capitalizes claims by discounting at 4% per year. This is done, however, without separate and explicit allowance for mortality as is done by actuaries.[113] The higher net capitalization rate includes the additional discount needed to allow for early death and thus tends to reproduce the results of actuaries fairly well.

The English net multipliers are based on a fairly high net capitalization rate of 4,5% per year. This does not seem to include allowance for the risk of early death but does seem to include allowance for the discount for general contingencies.[114]

[8.4.6] Prescribed real rate of return: There has been increasing disagreement in South Africa as to an appropriate real rate of return for discounting damages awards.[115] If there is to be conformity between awards, and the principle of distributive justice applied, then much the same rate should be used for assessing all claims. Determination of the real rate of return by reference to the evidence[116] is to be condemned if it opens the door to wildly

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[108]In *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 60-4 the court took an average view of future investment returns and found in favour of 1% per year.

[109]Typically awards to dependent children.

[110]These are subject to the favourable tax provisions of s10A of Income Tax Act 58 of 1962. As a rule funds are invested in one of the so-called '10x10 plans' which combine an immediate annuity with an endowment policy having a 10-year term to maturity.

[111]The average return on investments in the Guardian's Fund over the period 1960 to 1992 (see table 10B at 123) was 8,1% per year compared to participation mortgage bonds at 11,6% per year and inflation at 9,5% per year. See Anderson 'Actuarial Evidence' 28 concerning the dangers of so-called 'safe investments'.

[112]See, for instance, the article 'I relied on professional advice' published in *Finance Week* 19.12.85 790 and 27.2.86 413-16. For more recent instances in South Africa see *S v Vermaas* (T) *sub iudice* 1991 to 1993 and the Masterbond debâcle. The Financial Services Act 1986 in England requires that investment managers be registered with an approved financial body.

[113]See 129.

[114]See, for instance, the discussion of net multipliers in *Mallett v McMonagle* [1969] 2 All ER 178 (HL) 191. See too table 11 at 161.

[115]See paragraph 8.2.2.

[116]The South African courts have on the whole avoided the excesses that led the Australian High Court to lay down a fixed net capitalization rate of 3% per year compound (*Todorovic v Waller* (1981) 37 ALR 481 (HC)). Many Australian courts had failed to distinguish between a net capitalization rate and the nominal discount rate. An excessive proportion of court time had been devoted to extensive inconclusive evidence as to investment returns, inflation rates and taxation.

differing assessments.[117] Persistent substantial divergences require the introduction of a prescribed real rate of return,[118] ideally by amendment to the Uniform Rules of Court.[119] One might argue that the rate should be introduced by statute. However, if one bears in mind that the laid down rate is a procedural formalism[120] rather than a rule of law then resort to statute does seem to be unnecessary.

[8.5] NET CAPITALIZATION RATES

[8.5.1] Real increases in earnings: The standard net capitalization rate laid down for British Colombia in Canada includes allowance for real increases in earnings of 1% per year compound above the rate of inflation.[121] This reflects the general tendency in the past[122] for wages in the Western World to increase in real terms.[123] South Africa has special features compared to the highly industrialized and homogeneous populations of North America and Europe. Real growth in gross national product needs to exceed 3% per year in South Africa merely to ensure adequate job creation. Much of the growth in Western earnings has stemmed from labour saving technology, particularly computers. In South Africa a major trend is to 'narrow the wage gap' between whites and non-whites. Average real earnings for whites in South Africa have barely increased between 1975 and 1990,[124] whilst blacks have had real increases of 2,7% per year compound over the same period.[125]

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[117]In *Kotwane v UNSBIC* 1982 4 SA 458 (O) 466-7 the court allowed for wage escalation at 12% per year coupled with a discount rate of interest of 5% per year, a so-called negative net capitalization rate. A return in excess of 13% per year could have been obtained by investment in an immediate annuity with a life office. The low rates ordered in a series of Cape judgments of 1% to 1,5% per year (see footnote 19) are modest in comparison.

[118]Anderson 'Actuarial Evidence' 12 records laid down net capitalization rates in Canada of 2,5% per year for Ontario and Nova Scotia with 2% per year for British Colombia (the latter includes allowance for real increase in earnings at 1% per year above the rate of inflation). 3% per year has been laid down for Australia in *Todorovic v Waller* (1981) 37 ALR 481 (HC). A similar result has been achieved in England by *Mallett v McMonagle* [1969] 2 All ER 178 (HL) 190 which held that the multipliers should be assessed without express allowance for inflation. The effect of this ruling is to lay down a net capitalization rate of about 4,5% per year, that being the rate implicit to the English multipliers.

[119]Anderson 'Actuarial Evidence' 12 records that the rate for Ontario is laid down in terms of the Supreme Court Rules of Practice.

[120]See 34.

[121]See footnote 118.

[122]Indications are that these real rates of increase in earnings will not be repeated in the future to the same extent.

[123]Cooper-Stephenson & Saunders 'Damages in Canada' 157 record real increases in earnings of 2,72% per year compound since the beginning of the century with 3,3% per year after World War II until 1975. Anderson 'Actuarial Evidence' 30 records more modest increases of 1,8% per year for the years 1958 to 1982 with -0,6% for the years 1978 to 1982. Atiyah 'Accidents Compensation & the Law' 3ed 208 records that average earnings in the United Kingdom increased by almost a factor of 10 between 1948 and 1977 compared to a price escalation factor of about 5.

[124]*TRENDS* 3 1991 86.

[125]TRENDS 3 1991 86. De Bruijn has stated that this real rate of increase includes allowance for promotions which are normally assessed separately in a damages calculation (Koch (1982/83) *TASSA* 78 109). Anderson 'Actuarial Evidence' 31 states that 'The wage and salary index is based on national averages and, therefore, does not reflect increases resulting from individual seniority, merit and promotion'. Anderson's view would be correct if the proportion of managers to workers was fixed throughout the period of observation. A black wage index would undoubtedly be greatly effected by the promotion of large numbers of blacks to management and other skilled posts such as nursing and teaching.

The very high levels of unemployment in South Africa are bound in time to weaken the negotiating strength of employees and it seems unlikely that the substantial real increases of the past will be maintained in the future. At the same time one may postulate the decline of real earnings for whites.[126] Older workers tend to be better paid than younger ones performing the same task.[127]

[8.5.2] Medical inflation: It is frequently necessary to capitalize expected future expenses by way of medical treatment or prostheses and related equipment. In some instances judges have dispensed with discounting altogether and merely multiplied the expense by the period over which it is expected to be incurred.[128] This practice led to speculation that there was a rule of law that future expenses should be treated in this manner. This speculation has been laid to rest by an appellate division ruling[129] that the rate determined by actuarial evidence should apply. Past medical inflation has averaged below the rate of inflation in the long term but has exceeded the rate of inflation in the short term.[130] The earnings of medical practitioners have not generally kept pace with inflation[131] but have increased well above the rate of inflation over short periods.[132] These trends illustrate the point that care should be exercised with the interpretation of a substantial short-term increase in prices which may be no more than a temporary phenomenon. Allowance for the costs of future equipment and prostheses may justify an allowance for increases in excess of inflation if the goods are likely to be imported for long periods in the future.[133] Modern technology has, for

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[126]In *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 60 68 the court allowed for future salary increases in line with inflation every second year with only one third of inflation for intervening years, an effective investment differential of 4,5% per year average. In *Brunt v AA Mutual Insurance* 1990 (W) (unreported 26.2.90 case no 19198/87) the court ordered a discount rate of return of 15,5% per year coupled with salary escalation of 10,96% per year, an investment differential of 4,1% per year.

[127]Kantor & Rees 'SA Economic Issues' 47. That is to say for persons who are not promoted and thus remain in the same job grade.

[128]See, for example, *Stockenström v Commercial Union Assurance* 1974 2 C&B 435 (C) 436; *Erdmann v Santam Insurance* 1985 3 SA 402 (C) 404G. Newdigate & Honey 'The MVA Handbook' 158 express the opinion, in consultation with an actuary, that medical expenses will increase faster than inflation and should thus be discounted using a marginally lower net capitalization rate of 2% per year.

[129]*Ngubane v SATS* 1991 1 SA 756 (A) 769H 781E.

[130]The medical component of the consumer price index increased by an average 16,5% per year over the 10 years 1981 to 1991. The overall index increased by a comparable 14,6% per year. This indicates average medical price escalation of 1,7% per year compound in excess of the rate of inflation. However over the longer period 1970 to 1991 medical inflation was 12,2% per year compared to the overall index at 12,6% per year. Thus over the longer term medical inflation has been marginally below the rate of inflation.

[131]The earnings of self-employed medical practitioners have increased by an average 11,8% per year compound over the period 1973 to 1990 with inflation averaging a comparable 13,7% py over the same period, that is 1,7% py below the rate of inflation. The earnings of self-employed surgeons have, however, increased by a higher 12,6% py which is only 1% py below the rate of inflation ('The Income of Male Graduates' HSRC reports for 1984 1987 1990).

[132]For self-employed general practitioners the rate of increase in earnings has been 2,4% py above the rate of inflation for the period 1987 to 1990. For self-employed surgeons the rate has been 1,4% py above.

[133]Over the 20 years 1970 to 1990 the Consumer Price Index escalated by an average 12,6% per year compound. Over the same period the combined effect of currency depreciation and foreign inflation gave rise to effective import price escalation of 13,3% py for United States of America, 15,6% py for United Kingdom and 15,3% per year for Federal Republic of Germany. This reflects real increases of 0,6% py, 2,6% py and 2,3% py respectively (*TRENDS*

instance, increased the costs of motor cars due to the addition of enhanced features.[134] Much of the related price increases have, however, contributed to the increase in the rate of inflation. In other words the rate of inflation as measured by the consumer price index includes a substantial component representing an improved standard of living and quality of goods rather than pure depreciation in currency values. The rate of inflation is also increased by high prices for expensive imported goods, usually technically advanced. Technology, on the other hand, has also greatly reduced the cost of devices such as radios and computers. In some instances price reductions will be achieved by local manufacture.[135] Persistent price rises above the rate of inflation are likely to bring about substitution as buyers seek cheaper alternatives or change their lifestyles by doing without.[136] Alternatively the rate of inflation will increase to accommodate the higher price levels. Over and above this consideration claimants who have been compensated by lump sum will be spending their own money and may be expected to optimize cost relative to effectiveness of goods or services purchased.

In suitable circumstances medical and prosthetic expenditure may be deducted from taxable income.[137] Allowance for this advantage may be by way of a deduction for general contingencies or by way of an increase to the net capitalization rate.

[8.5.3] Reducing rates of inflation: The reports of many actuaries state a rate of inflation that reduces each year for 3 to 5 years after the date to which discounting is done. This is not, as one would suppose, in anticipation of lower inflation rates in future. Discussions with such actuaries reveals that the assumed declining rate of inflation is intended to adjust for the phenomenon under stable investment conditions whereby short-term rates are lower than long-term rates.[138] For this reason the actuary seeks to use a lower net capitalization rate for the cost of items in the near future than in the more distant future. The approach is acceptable in principle but would be less confusing if it were achieved by using a discount rate of return that increased rather than an inflation rate that reduced. The approach may also be criticized on the ground that South African investment conditions have in recent years inverted the normal state of affairs with short-term rates higher than long-term rates.[139] On no occasion observed by my office[140] has the actuarial inflation/interest assumption been adjusted on this account. It would be preferable if actuaries did not reduce their rate of inflation but used instead a suitable flat average rate.[141]

September 1991).

[134]See, however, paragraph 12.15.1 and the associated adjustment to the award of general damages.

[135]A locally manufactured stand-up wheelchair is less than half the cost of an imported one.

[136]*Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 75-6.

[137]See footnote 118 at 231.

[138]What is known technically as the normal yield curve.

[139]A phenomenon described by analysts as an inverted yield curve.

[140]Over a period of 15 years embracing several thousand actuarial reports.

[141]This view is not altered by the reduction in inflation in late 1992 because expected long-term investment returns reduced together with the rate of inflation.

[8.6] CONCLUSIONS

Although it is usual to speak of the 'discount rate of interest' it needs to be borne in mind that this is a reference to the expected investment rate of return obtainable on a wide variety of possible investments including shares and immovable property. Fixed interest investments are but one of the investment options. The discount for interest is best explained as the reduction to the present utility of a payment by reason of its being deferred in time. There is no evidence which can conclusively decide the choice of a discount rate. In order to ensure consistency in awards it is desirable that the real rate of return to be used for discounting damages claims be prescribed by the authorities at a level of about 2,5% per year compound. Medical expenses and the costs of assistative devices can be expected to increase in the long term in line with inflation.

CHAPTER 9

GENERAL CONTINGENCIES

Summary: *The deduction for general contingencies reflects the court's subjective impression as to the adequacy, or otherwise, the comparative utility, of the primary actuarial calculations. Although collateral benefits are sometimes viewed as part of the general contingencies the risks attaching to what has been, or will be lost, are the major component of the deduction. Allowance for such risks can equally be achieved through an increase to the discount rate of return.*

[9.1] INTRODUCTION

[9.1.1] Early judgments: The adjustment for general contingencies enables the court to give expression to its overall feelings about the basic actuarial calculation. The primary purpose of the adjustment is to allow for risk and uncertainty.[1] Few texts communicate the nature of general contingencies more vividly than the English judgments which first introduced it as an explicit adjustment:

> 'She had lost an annuity for the joint lives of herself and her son... The value of the annuity spoken to in the evidence was the value of an annuity on government or other very good security, and that the annuity lost was that secured by the personal security of the deceased and, therefore, of much less value'.[2]

> 'When the Fatal Accidents Act, 1846, was passed, it was thought for a short time by some that damages might be given "to the full extent of a perfect compensation"... "It would be most unjust" (however) "if whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done"'.[3]

> 'A thousand circumstances might have prevented him from making that income if he had remained well, and the accident had not happened... the jury would be wrong if they did not consider those circumstances as upon the doctrine of chances'.[4]

[9.1.2] All embracing adjustment: The adjustment is not confined to considerations of risk and uncertainty: The court may, for instance, wish to make adjustments for taxation or costs

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[1] 'Risk' is the prospect that things may not turn as out as expected. 'Uncertainty' is doubt as to the correctness of existing verifiable information.

[2] *Rowley v London & NW Rail* [1861-73] All ER Rep 823 (Exch) 828.

[3] *Rowley v London & NW Rail* [1861-73] All ER Rep 823 (Exch) 829-30.

[4] *Phillips v London & SW Rail* [1874-80] All ER Rep 1176 (CA) 1180-1.

saved by the victim with no longer having to travel to work on a daily basis. The court may feel that the earnings basis used as input for the calculation is too low or too high. The court may wish to make allowance for the chance of future employment in the injured condition.[5] Such considerations of factual input can, however, also be corrected by referring the matter back to the actuaries for a recalculation using inputs dictated by the court.[6]MMF

[9.1.3] Implicit adjustments: In Roman-Dutch times the adjustment was introduced by an implicit scaling down of the input parameters: 'Since proof of damage is difficult, the judge should in doubtful cases adopt the course most favourable to the defendant and award low damages rather than high damages'.[7]

[9.1.4] Deductions used in practice: In general the deduction for contingencies will increase with the lengthening of the period of risk. A short period of past loss of one to three years may attract no deduction at all whereas a five or seven year period may well justify some deduction. For future loss one finds a deduction of 20% being made for a man in his 20's but only 10% for a claimant aged 46.[8] For a man close to retirement a low or nil deduction may be more appropriate. These percentages suggest a formula of ½% per year of working life to 65 as a general guide to the sort of deduction that is usual. The formula has intuitive appeal giving expression to the concept of a widening funnel of doubt[9] as one extends the earnings projections into an increasingly dim and distant future. The formula presumes a person with only moderate job stability. For a person with a proven history of job stability the deduction may well be much less. For a person with a history of frequently interrupted employment the deduction might rise as high as 33%[10] to 50%,[11] even for past losses.[12] The self-employed person and the employee with substantial overtime would be assessed as having a higher risk profile than an employee who draws a regular salary. The earnings of an employee who enjoys substantial insurance cover and pension benefits will generally have a lower risk profile than for the employee who does not enjoy such benefits.[13] Further risks

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[5]For further items see Koch 'Damages' 59 62.

[6]*Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 728 'The matter will now stand down until such time as the actuaries have completed their calculations on the aforegoing basis. It may then be mentioned again for the purpose of leading further evidence, if necessary, and of enabling me to make such final awards or orders as may be appropriate'. See too *Smart v SAR&H* 1928 NPD 361; *Snyders v Groenewald* 1966 3 SA 785 (C); *Bailey v Southern Insurance* 1981 3 C&B 178 (C); *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C). A court that has adopted this procedure cannot be said to have considered the general equities of the case if it has not been informed of the result of the recalculations (*Nochomowitz v Santam Insurance* 1972 3 SA 640 (A) 644H).

[7]Erasmus 1975 *THRHR* 268 269inf. D50.17.125 '*Favorabiliores rei potius quam actores habentur*' cited in *Bay Passenger Transport v Franzen* 1975 1 SA 269 (A) 274H.

[8]*Goodall v President Insurance* 1978 1 SA 389 (W) 393.

[9]Redington 1952 *JIA* 286 287 'Thus we may say that there is an expanding funnel of doubt. The contours of the funnel vary with each one of us, for the concept is personal. Nevertheless, they must inevitably have much in common, since they all start from a common point now'.

[10]See, for instance, *King v Geldenhuys* 1983 3 C&B 379 (C) 381inf.

[11]*AA Mutual Insurance v Maqula* 1978 1 SA 805 (A) 813D.

[12]*AA Mutual Insurance v Maqula* 1978 1 SA 805 (A) 813D.

[13]See 151.

such as divorce[14] or remarriage[15] would be additional to these percentages. In the event of injury leading to a partial loss of earning capacity the court may assign different contingencies to the career path but for the injury and the career path having regard to the injury.[16]

[9.1.5] More than just days unemployed: It would be a gross oversimplification to view the deduction for general contingencies as a number of days or weeks per year of unemployment. A massive loss of earnings can arise merely because future salary increases fall behind inflation by 1% or 2% per year. Seemingly stable employees have been known to suffer substantial capital losses over short periods of time through unsuccessful attempts to set up their own businesses or to emigrate overseas.

[9.2] RELEVANT CONSIDERATIONS

[9.2.1] Insurance reduces the risks of life: The qualities that render a man a stable employee and a good wage earner are much the same qualities that will lead him to insure himself against risk.[17] Earning capacity is not merely the ability to generate earnings but also the ability to minimize the risks attaching to continuing income.[18] The deduction made for general contingencies when assessing loss of earning capacity[19] is in one sense[20] the notional insurance premium needed to render future earnings free of all risk. Many employers today provide substantial insurance cover as part of the remuneration package. This relieves them of the moral pressures which would otherwise arise to provide gratuitous benefits in the event of an accident befalling an employee. The future income of employees so protected is subject to less risk, that is say contingencies, than the income of an employee who does not enjoy insurance cover.

The self-employed person who insures himself will have to pay the premiums from his earnings. For an employee there will often be little or no deduction from his basic earnings, the majority of the cost being met the employer. An employer is less likely than an employee to allow insurance cover to lapse. The average self-insured income earner thus has a higher risk profile than the average employer-insured employee.

[9.2.2] The unemployed victim: An adult victim may have been inbetween jobs at the time of the injury or death. Even for persons who were in employment at the time of the injury

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[14]*De Jongh v Gunther* 1975 4 SA 78 (W) 83E-F.

[15]*Legal Insurance v Botes* 1963 1 SA 608 (A) 617G.

[16]*Hutchings v General Accident Insurance* 1986 3 C&B 737 (C) (10% & 20%); *Venter v Mutual & Federale Versekeringsmpy* 1988 3 C&B 749 (T) (10% & 25%); *Brink v The MVA Fund* 1991 (C) (unreported 2.8.91 case 6038/89) (15% & 30%). More generally see Koch 'Damages' 164-5 and 219 below.

[17]McGregor 1965 *MLR* 629.

[18]Where earnings are highly at risk a large deduction will be made for general contingencies (see, for instance, *AA Mutual Insurance v Maqula* 1978 1 SA 805 (A) 813; *King v Geldenhuys* 1983 3 C&B 379 (C) 381).

[19]See, for instance, *Goodall v President Insurance* 1978 1 SA 389 (W) 393F-G for a general discussion of what deductions are usual.

[20]The deduction for general contingencies is concerned with very much more than just pure risk.

or death it is common that the employer has by the time of the trial ceased trading or engaged in major layoffs. Such circumstances may justify a substantial contingency deduction of 10% to 50% or more when assessing past loss of earnings or support.[21] For an unemployed person the chances of finding employment will increase with the passage of time. The deduction for general contingencies for future loss will thus in certain instances **be less than** the deduction applied to past loss.

For an unemployed child or young adult who has never worked there will be uncertainty not only as regards the finding of employment when the time comes but also as regards educational progress. This consideration is particularly relevant when the education system is subject to major disruptions. Education on its own does not guarantee a job. The industrial psychologists who testify as to the potential earnings of a victim tend to have regard to potential rather than likelihood.[22] The more common salary surveys used for these estimates are based on the salary structures of large corporations in the formal sector.[23] Indications are that rates of pay in the informal sector are about half of the rates for the formal sector.[24] In *Southern Insurance v Bailey*[25] a contingency deduction of 25% was applied despite substantial positive factors such as an unduly low earnings basis for the actuarial calculation. In *Khuduge*'s case[26] the claimant had never worked but the court, in a somewhat maverick mood,[27] saw fit to make no deduction whatsoever for general contingencies.[28]

One may expect the deduction for general contingencies for an unemployed victim to be substantially greater than for an employed victim of the same age and having regard to the same employment.

[9.2.3] Costs of travelling to and from work: The deduction for general contingencies sometimes includes allowance for the saved costs of travelling to and from work and the

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[21]For example see the 50% deduction applied in *AA Mutual Insurance v Maqula* 1978 1 SA 389 (W) 393G-H. See too 220 below.

[22]Property valuators refer to 'highest and best use' for land (see 30 above). In *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1020G the court emphasised that compensation should be based on probable earnings rather than potential earnings (see 235 below).

[23]See footnote 87. *Business Day* February 11, 1993 at 4 reports that only about 45% of the population is employed in the formal sector. True unemployment, the article states, is more like 7% to 12% with roughly half the workforce employed or self-employed in the informal sector. See next footnote. Only 8,5% of persons entering the job market find employment in the formal sector.

[24]I base this observation on claims processed by my office. Not the least factor in this regard is the negotiating power of the trade unions.

[25]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 117.

[26]*Khuduge v Santam Insurance* 1991 (W) (unreported 23.5.91 case 4637/90).

[27]The defendant seems have had inadequate legal representation because elsewhere in the judgment the full costs of a bed are awarded without deduction for what claimant would have spent on a bed and mattress had he not been injured.

[28]See too *Guardian National Insurance v Engelbrecht* 1989 4 SA 908 (T) where a nil deduction was approved by an appeal bench of three judges. For an employed victim in his 20's the usual deduction according to the ½% per year formula would be about 20%.

saved cost of work clothes.[29] In those instances where a deduction has been made for travelling costs it has been about 8% of earnings.[30] If the usual deductions for general contingencies included an allowance for saved travelling costs then the deduction for both past and future losses should not reduce below 8%. The deductions generally made do not follow this pattern[31] so we must conclude that many such deductions have not included allowance for saved travelling expenses. It needs be borne in mind that travelling costs are not saved by a victim who continues to work, albeit at a lower rate of pay. A deduction for saved travelling costs should also not be made from the value of a pension which the victim would have enjoyed had he not been injured or killed.[32] This saving is sometimes offset after the injury by the costs of travelling to obtain medical attention.

[9.2.4] Early retirement: Medical experts quite frequently prognosticate that the injuries suffered by a victim, who has remained in employment, will bring about retirement at an earlier age than had there been no injury.[33] It is also common practice to allow a higher percentage deduction for general contingencies for the injured condition than for the uninjured condition, the allowance for reduced mobility in the job market, otherwise known as 'reverse contingencies'.[34] A court faced with such considerations needs to exercise care that the contingency of early retirement is not brought into account twice, once by way of explicit allowance for early retirement in the actuarial calculation, and then again by way of general contingencies.[35]

[9.2.5] Divorce: With claims for loss of support the deduction for general contingencies would need to include allowance not only for the risks attaching to the deceased's employment but also for the risk of divorce. If one in five marriages, that is to say 20%, are ending in divorce then one would expect an add-on to the usual contingency percentages of about 10%.[36] This suggests normal contingency deductions of about 30% for young couples.[37] The add-on for divorce will probably reduce to close to zero for ages of 55 and over. Although maintenance may be provided on divorce this is often of short duration pending employment by the ex-wife. For children from lower income groups there is a high

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[29]*Kontos v General Accident Insurance* 1989 4 C&B A2-1 (T) lists the saved costs of travelling to and from work as one of the factors to be borne in mind when assessing general contingencies; see to Corbett & Buchanan 3ed 66-7.

[30]Deductions for travel costs were made in *Sumesur v Dominion Insurance* 1960 1 C&B 228 (D) 232-3 (7,5% deducted); *Maasberg v Hunt Leuchars & Hepburn* 1944 WLD 2 12 (9%). There may of course be alternative costs with travelling to medical centres. See 226 below.

[31]0% for past loss; ½% per year to retirement for future loss (see 150).

[32]See 155.

[33]See, for instance, *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 70-2.

[34]See 219.

[35]*Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 72 'Self-evidently, this finding incorporates a built-in contingency allowance'.

[36]One half of 20% assuming that divorce occurs on average at ages of about 40 to 45. Available statistics indicate divorce rates of about 1% per year with higher rates for marriages concluded more recently (see 289).

[37]20% according to the ½% per year formula plus 10% for divorce.

incidence of failure by fathers to comply with maintenance orders.[38] It follows that the contingency of divorce is relevant to the claims by the children.

[9.2.6] Early death: The standard actuarial calculation includes full allowance for the risk of early death[39] and the deduction for general contingencies should thus make no allowance for this consideration. Exceptions to this rule arise when the calculation has not been done by an actuary[40] and when the evidence indicates heavier mortality, a greater risk of early death, than has been allowed for in the actuarial calculations.[41]

[9.2.7] Medical and related expenses: A deduction for general contingencies will be made from the present value of future medical treatment and assistative persons or devices.[42] This would reflect the chance that the relevant expense may not be incurred or that cheaper alternatives may come available. An expert may recommend a device or a procedure but a compensated victim may thereafter not wish to follow the advice. Conversely allowance should be made for the unforeseen costs of complications. Advances in medical science may devise a cure for paraplegia.[43] These issues will be discussed below under damages for personal injury.[44]

[9.2.8] Layers of earnings: The risk attaching to earnings varies not only with time but also with the level of earnings. The top layer of earnings is subject to much greater risk than the lower levels. This is particularly obvious with overtime earnings or commission earnings added to a basic salary. An employer who wishes to reduce an employee's salary may achieve this merely by discontinuing increases to offset inflation. The vast majority of employment contracts do not entitle an employee to increases to offset the effects of inflation. The extent to which such increases are granted by an employer depends on the relative negotiating strengths from time to time of employer and employee. The same is true of salary increases associated with promotions. In analysing general contingencies one might thus distinguish between:

* Basic earnings at time of delict.
* Future increases to offset the effects of inflation.
* Future increases associated with promotions.

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[38]See Burman '*African Customary Law*' 36-51 and 307 below.

[39]See 87.

[40]Where the 'Murfin method' has been used (see Newdigate & Honey 'MVA Handbook' 166-73) then for injury claims adequate allowance will have been made for the risk of early death. When a widow claims for loss of support the 'Murfin method' does not make an adequate deduction for the joint-life risks of early death.

[41]See, for example, *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1027J.

[42]*Administrator-General SWA v Kriel* 1988 3 SA 275 (A) (25%); *Van der Plaats v SA Mutual Fire & General Insurance* 1980 3 SA 105 (A) 113-14 (5%); *Erdmann v Santam Insurance* 1985 3 SA 402 (C) 405D (50%); *Ncubu v NEG Insurance* 1988 2 SA 190 (N) 198B (15%); *Hutchings v General Accident Insurance* 1986 3 C&B 737 (C) 745 (30%). In *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) different deductions were applied to different classes of expenditure.

[43]See *Time Magazine* December 14 1992 at 48.

[44]See section 12.9.

* Overtime and commission earnings.

Basic earnings would only be lost in the event of total unemployment not covered by unemployment insurance or sick pay.[45] The risks attaching to the higher levels of earnings would require progressively larger percentage deductions. The earnings of the self-employed generally include a core income of fairly low risk plus a fluctuating upper layer which behaves like overtime or commission income.

High levels of unemployment may lead to low levels of overtime as unions seek to preserve jobs. Employers who fear industrial court actions when laying off employees may well prefer higher levels of overtime, certainly to meet temporary exigencies. Fairly heavy deductions for general contingencies are appropriate if the earnings calculation includes allowance for substantial overtime.[46]

[9.2.9] Risk attaching to pensions: Once an employee has retired on pension his income is then not necessarily free of risk. If his pension is funded entirely from accumulated capital then the level of risk would equal that attaching to the capital itself and its investment potential. However, a number of major pension funds are not fully funded,[47] a factor which calls into the question the sustainability of increases to pensions in payment. The ability of such funds to continue payments, let alone make increases to offset inflation, may depend on the willingness of the original employer to continue to apply profits to the benefit of non-productive pensioners.[48] Active employees may well begrudge increases for pensioners at the expense of increases for themselves. The risks attaching to future pension payments will often be no better than the risks attaching to the primary business venture which funds the pension payments. Actuaries generally escalate future pensions at rates below the rate of inflation.[49] A positive contingency would then be the prospect of full inflation linking.

There is an increasing tendency by employers to provide disability income benefits in lieu of an early retirement pension. These benefits provide for the guaranteed payment of 100% of the employees salary for a period of 12 to 24 months after the cessation of employment. The benefit then reduces to 75% of salary and continues until normal retirement. At the normal retirement age a retirement pension is then provided based on the disability income being paid at the time of retirement. The disability income is usually subject to an ongoing deduction by way of a pension contribution. The policy conditions usually provide for the disability income to reduce or cease if the victim takes up alternative gainful employment.

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[45]This is essentially the risk analyzed by Luntz 'Damages' 295-303 but without allowance for cataclysmic events.

[46]What is substantial will depend on the type of work being done. Some jobs, such as engine driver for the railways, require regular overtime. For some employers paying overtime is preferable to paying salary for a number of reasons: Overtime usually does not give rise to increased bonus and expensive pension entitlements, and it relieves the employer of the need to employ additional staff with scarce skills or long on-the-job training requirements.

[47]See, for instance, Wassenaar 'Squandered Assets' 75-117.

[48]Pensions payable in terms of the Workmen's Compensation Act 30 of 1941 have a sorry track record (increases have been 10% in 1987; 15% in 1989; 10% in 1991; 6% in 1992) averaging about 40% of the rate of inflation compared to the 67% to 100% of inflation that is achieved by most pension funds.

[49]Observation based on several thousand reports received over the years by my office.

The contingencies attaching to these disability income benefits can be quite high particularly when future increases to the income, and even the income payments themselves, are subject to the discretion of the employer.

In general the risks attaching to a pension are less than those attaching to earnings. Not the least because the ill-health or changed life plan of the recipient will not affect the pension payments, except, of course, if the events bring about an early death. An injured victim may receive a substantial early retirement pension from his employer. It is tempting to argue that when assessing damages a lesser deduction for general contingencies should be applied to the pension benefits than to the earnings but for the injury. There is much to be said for this approach provided it is borne in mind that the availability of substantial disability-insurance cover provided by the employer substantially reduces the general contingencies for the overall earnings.[50]

[9.2.10] Subjective impression: The adjustment is assessed on the basis of subjective impression rather than objective calculation.[51] The opinion of an actuary as regards general contingencies has in the past been condemned[52] but in more recent years accepted without demur.[53] A number of analysts have observed that the deductions made in practice do not bear any sensible relation to unemployment statistics.[54] The focus on a quasi-irrational impression[55] leads to a preference for round percentages such as 5% 10% or 20%.[56] In many earlier judgments awards were adjusted to round sums of money.[57] These factors all point to a subliminal pricing psychology.

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[50]See 151.

[51]*Shield Insurance v Booysen* 1979 3 SA 953 (A) 965G 'The determination... for such contingencies involves, by its very nature, a process of subjective impression or estimation rather than objective calculation'; *Sigournay v Gillbanks* 1960 2 SA 552 (A) 569A.

[52]*Shield Insurance v Hall* 1976 4 SA 431 (A) 444F 'Mr Murfin is a consulting actuary. He is in no position and is not qualified to give evidence as to the hazards and contingencies applicable to any particular type of work'. This was a most unfair condemnation of a man with extensive experience in compensation work.

[53]See, for instance, *Brink v The MVA Fund* 1991 (C) (unreported 2.8.91 case 6038/89) (15% uninjured, 30% injured). Some actuaries handle in excess of 1000 claims a year. The actuary who testifies in this regard provides guidance as to the established legal norms, not the implications of statistical analysis. Actuarial evidence on contingencies should, however, be received with care because the actuary will usually not have heard all the evidence presented to the court.

[54]Street 'Damages' 120-5; Cooper-Stephenson & Saunders 'Damages in Canada' 255-9; Luntz 'Damages' 2ed 295-300; Boberg 1964 *SALJ* 194 212. In South Africa unemployment statistics do not give a reliable guide to actual unemployment levels. Outright unemployment is not the only contingency. Also to be considered is the risk that wage escalation will fall behind inflation or that the claimant may have ventured unsuccessfully into self-employment.

[55]Colourfully described in *Goodall v President Insurance* 1978 1 SA 389 (W) 392-3 'In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practised by ancient prophets and soothsayers, and by modern authors of a certain type of almanack, is not numbered among the qualifications for judicial office'.

[56]See table in Koch 'Damages' 334-8.

[57]*Clair v PE Harbour Board* (1886) 5 EDC 311 317 318; *Waring & Gillow v Sherborne* 1904 TS 340 349-50; *Chisholm v ERPM* 1909 TH 297 302; *Union Government v Clay* 1913 AD 385 389; *Hulley v Cox* 1923 AD 234 246; *Sigournay v Gillbanks* 1960 2 SA 552 (A) 568-9.

[9.2.11] Consistency between awards: In theory the adjustment for general contingencies is assessed *de novo* for each new matter. In practice the need for consistency between awards leads to guidance being sought from past judgments[58] in much the same loose manner as with awards for general damages.[59] This reflects the principle that a discretion accorded to the court should be exercised judicially and not idiosyncratically.[60]

[9.3] THEORETICAL ASPECTS

[9.3.1] Always a deduction: The adjustment for general contingencies is almost without exception a deduction.[61] There is a theorem in utility theory which states that the utility of an expected value subject to uncertainty is always less than or equal to the expected value.[62] The fact that the allowance for contingencies is so frequently a deduction is evidence of the validity of this theorem. However, if the basic inputs to the calculation by way of earnings, taxation, inflation, interest and mortality have been properly selected to evenly balance the chances of excess or understatement[63] then it is tempting to suggest that no deduction at all should be made for general contingencies.[64] Such a conclusion presupposes that all contingencies affecting earnings and living expenses have been brought into account. The majority of earnings' scenarios presume, however, that the employer will continue to prosper and that the economy will continue to thrive. Two world wars, the great depression, the collapse of communism, and the advent of AIDS[65] are reminders that wholly unpredictable cataclysmic events can supervene. It would not be unreasonable to assume that seemingly objective assessments of risk made during a time of peace are somewhat optimistic.[66]

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[58]*Hulley v Cox* 1923 AD 234 246 'Of course, each claim must depend on its own facts, and a comparison with other cases can never be decisive, but it is instructive'.

[59]See, for instance, *Protea Assurance v Lamb* 1971 1 SA 530 (A) 535-6.

[60]*Cookson v Knowles* [1978] 2 All ER 604 (HL) 606H; Hahlo & Kahn 'The SA Legal System' 215. See 38 above.

[61]See schedule in Koch 'Damages' 334-8. It is arguable that upward adjustments were made in *Maasberg v Hunt Leuchars & Hepburn* 1944 WLD 2 15-16 and *Laney v Wallem* 1931 CPD 360 364 but these are notably isolated instances. In *Southern Insurance v Bailey* 1984 1 SA 98 (A) the court acknowledged the existence of substantial positive contingencies in that the earnings basis had been pitched at too low a level. This consideration notwithstanding the court increased the deduction for general contingencies from the trial court's 10% to 25%. One wonders what the deduction would have been had a more substantial earnings basis been adopted! The ½% per year formula suggests a deduction of about 30%.

[62]Pearce 'Cost-Benefit Analysis' 2ed 79. See footnote 70 at 138 above.

[63]Expected values in the statistical sense.

[64]Boberg 1972 *SALJ* 147 150 'The practice of making a deduction for "contingencies"... is illogical and should be abandoned. In the absence of supporting evidence, there is no better reason for assuming that the occurrence of so-called contingencies would reduce the plaintiff's loss any more than it would increase it... In a field where nothing is known and all is surmise, it is better not to speculate at all than to speculate one-sidedly'. See too 1964 *SALJ* 194 215n24; Newdigate & Honey 'The MVA Handbook' 176; Cooper-Stephenson & Saunders 'Damages in Canada' 246-9; Van der Walt 'Sommeskadeleer' 8; Van der Walt 1980 *THRHR* 1 22-3.

[65]The question of AIDS does not as yet seem to have received judicial consideration in relation to damages assessments.

[66]The adversary system encourages exaggeration, both up and down. Sympathy for the victim may well colour the evidence of some experts and subliminally that of a judge. A general practice of downward adjustment for contingencies ensures that the defendant is afforded some relief from such tendencies. A wealthy western economy can afford to take a more generous approach to damages awards than a less prosperous economy such as exists in South Africa.

Keynes has observed that the expectations of investors are seldom borne out by unfolding reality.[67] Pearson has pointed to the 'variety of misfortunes which can befall nations as well as individuals'.[68] These would seem to be the considerations that justify the preference for a downward adjustment for general contingencies.

In *Bailey*'s case[69] the court made the observation that not all contingencies are negative. In the circumstances of that case, **despite regard for positive contingencies**, the deduction for a child victim was increased to 25% from the 10% deducted by the trial court. The observation as regards positive contingencies was thus with a view to moderating the deduction for general contingencies having regard to the otherwise substantial future uncertainties facing a child.

[9.3.2] Utility of capital: One suspects that capital has a positive utility for many persons[70] which vastly exceeds the normal actuarial interest and mortality discounts. From the acquisition of capital flows a material upliftment of status and the provision of new opportunities to obtain and use desirable assets. This utility factor will be greatest for persons who aspire to upward social movement.[71] There will undoubtedly be those who prefer to live their lives with a regular income untroubled by ambition or temptation to spend. The general popularity of football pools and horse-racing jackpots suggests that there is a marked preference for a large sum of immediate capital. This assertion could be measured by allowing claimants to choose between lump-sum damages and instalments and monitoring subsequent awards. Instalment payments by a quasi-government institution such as the MMF would be subject to a very low risk of default. The considerations voiced in *Rowley*'s case[72] would then be relevant. A pronounced claimant preference in favour of lump sums would justify an increase to the general contingencies applied to a lump sum over and above those applied to the instalment payments. Defendants, however, may choose to abandon this discount because of the administrative costs that attach to instalment payments.

[9.3.3] Widening funnel of doubt: It has been noted above that the usual pattern of deductions for general contingencies is described with fair accuracy by the formula ½% for each year to normal retirement.[73] Underlying this formula is the concept of a widening funnel of doubt[74] as one projects into the dim distant future. A major objection to this formulation of risk is that the deduction is applied to the total present value of future earnings

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[67]Keynes 'The General Theory' 152 'This does not mean that we really believe that the existing state of affairs will continue indefinitely. We know from extensive experience that this is most unlikely'.

[68]See quotation at 42.

[69]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 117B 'It is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable'.

[70]As compared to the utility of the equivalent income.

[71]Friedman & Savage 1948 *JPE* 279.

[72]See quotation at footnote 2.

[73]This implies a percentage deduction of 20% for a young man in his 20's, 10% for a claimant aged 45 and 0% for a claimant close to retirement age.

[74]Redington 1952 *JIA* 286 287.

or support, that is equally to notional earnings one year after the date of calculation as to earnings 20 years after the calculation.[75] A seemingly preferable approach is to make the deduction separately for each future year on a sliding scale, as the actuaries do with mortality.[76] For example for year 1 a deduction of ½% would be made; 1% for year 2; 1½% for year 3, etc; 5% for year 10; 10% for year 20; and so on. This reflects the real nature of the widening funnel of doubt. The major objection to such an approach is that its application requires a lengthy calculation. The judge cannot just make a final percentage deduction from the overall value. The approach is to be commended, however, under circumstances where the court has referred the matter back to the actuaries for purpose of recalculation.[77]

[9.3.4] Increase to the discount rate: The discount rate of interest comprises a basic real rate of return plus an additional return to compensate the investor for the risk attaching to the investment. For long-term fixed interest investments this has been described as the 'liquidity premium'.[78] For more complex investments one finds that the price, the value in exchange, decreases with increasing risk[79] so that a higher internal rate of return is needed if one is to reproduce the price by discounting the future cash flow.[80] Hence one may allow for risk by increasing the discount rate of interest. The same procedure would be entirely valid for pricing damages awards. The allowance for general contingencies could be brought in by way of an addition to the discount rate of interest, perhaps +½% or +1% per year.[81] The deduction for risk would then increase with remoteness in time giving proper effect to the widening tunnel of doubt.

I have noted[82] that the MMF uses a net capitalization rate of 4% per year but without separate allowance for mortality, as is done by actuaries. The difference between 4% per year and the 2,5% per year generally used by actuaries introduces a suitable discount for early death.[83] The calculations by the MMF thus reproduce fairly well the results obtained by actuaries using more sophisticated techniques.

A similar effect is achieved by the English courts who use net multipliers based on a net

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[75]A further reservation is that although risk in relation to employment is generally highest during the unsettled early years the income of a young working person is generally an understatement of his career average (Kantor & Rees 'SA Economic Issues' 47).

[76]See year-by-year method described at 88.

[77]See footnote 6.

[78]Pepper 1984 *TFA* 145 147.

[79]Mainly risk of fluctuations of which ruin and total loss of capital is the extreme case.

[80]Beta theory is summarized by Weston & Brigham 'Managerial Finance' 247-75 312-13.

[81]In *Gillbanks v Sigournay* 1959 2 SA 11 (N) 14H counsel suggested that a discount rate of 5% per year be used and that general contingencies then be ignored. This reflected a 1% per year addition to the actuary's rate of 4% per year.

[82]See 129 and 144.

[83]But not when discounting is done over the expectation of life because that period already includes full allowance for the risk of mortality.

capitalization rate of about 4,5% per year.[84] The English net multipliers include allowance for general contingencies and mortality. The discount for general contingencies, excluding mortality, is not introduced by way of separate deduction, as in South Africa with its gross multiplier system. The fairly high discount rate of 4,5% per year thus includes the additional discounts needed to allow for general contingencies. This rate is applied to a period which includes allowance for the risks of mortality.[85] The rate of 4,5% per year thus does not include allowance for the risk of mortality.

[9.3.5] Illustrative calculations: One way of giving effect to a widening funnel of doubt is to increase the discount rate of interest by, say, ½% per year from 2,5% per year to 3% per year. Losses one year ahead would then be discounted by 3% per year (2,5% for investment return and ½% for general contingencies). The losses for year 2 in the future would be discounted by 2,5% per year for 2 years plus a further 1% (½% per year for 2 years). The losses for year 10 in the future would be discounted by 2,5% per year for 10 years plus a further 5% (½% per year for 10 years). A loss 40 years in the future would be discounted by 2,5% per year for 40 years plus a further discount of 20% (½% per year for 40 years). Each separate year would be subject to a different percentage deduction.[86] For sake of the argument I have used simple interest. In practice compound interest would be applied so the percentages for deduction in each year would be larger than the percentages stated above.

Table 11 shows the effect in terms of a flat percentage contingency deduction of increasing the net capitalization rate.[87] Under the column 'Equivalent general contingency deduction' is shown first the normal deduction according to the ½%-per-year-to-retirement formula. It is evident from the table that this level of contingency deduction is fairly accurately reproduced by increasing the net capitalization rate by 1,5% per year over and above the basic real rate of return.[88]

[9.3.6] Different approaches - same result: The effect of discounting at a low net capitalization rate is to introduce a positive, that is to say add-on adjustment for general contingencies. The effect of using a 1% per year net capitalization rate has been illustrated in table 11. The use of a 1% net capitalization rate coupled with a normal deduction for general contingencies has roughly the same effect as using a 2,5% per year net capitalization rate with a nil deduction for general contingencies.

[9.3.7] Share-market risk profiles: The analysis of share market returns shown in table 10A[89] indicates expected future investment returns in the long term of at least 2% per year above the prevailing dividend yield, that is to say an expectation in June 1992 of at least 5,5% per year. The figures in table 11 for a 5,5% per year net capitalization rate show the

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[84]See 144.

[85]See *Mallett v McMonagle* [1969] 2 All ER 178 (HL) 191.

[86]See table 5 at 88.

[87]Separate allowance has been made for the contingency of early death using SALT79/81 coloured male mortality.

[88]Here taken to be 2,5% per year compound.

[89]See at 122.

TABLE 11 - GENERAL CONTINGENCIES and THE DISCOUNT RATE OF INTEREST

Net Cap Rate py	Present Value R10000py	Equivalent General Contingency Deduction
	Age 55 to 65 (10 yrs)	**-5%**
1,0%	81010	+5%
2,5%	76896	0%
4,0%	73170	-5%
5,5%	69789	-9%
	Age 45 to 65 (20 yrs)	**-10%**
1,0%	147433	+12%
2,5%	132030	0%
4,0%	119200	-10%
5,5%	108437	-18%
	Age 25 to 65 (40 yrs)	**-20%**
1,0%	270601	+26%
2,5%	214520	0%
4,0%	174735	-19%
5,5%	145785	-32%

general contingency deductions which need to be made if the risk attaching to the continuing loss of earnings of R10000 per year is to be assessed as the same as that for the average investment in the share market. If one takes the view that salaries and dividends paid by a listed company are derived from the same profit source then the risk profiles of these payments should be subject to fairly similar risks. The comparison in table 11 suggests that deductions for general contingencies at ½% per year to retirement are by and large correctly assessed relative to the investment market's assessment of risk on listed shares. In other words the prices at which earning capacities are traded in the 'forensic exchange' are being correctly assessed relative to share-market investments. This observation is, however, only valid for the very low dividend yields of about 3,5% that have prevailed since 1989.

[9.3.8] Low share prices indicate high risks: The analysis in table 10A of share-market returns shows an average real yield of 9,3% per year since 1960. Against this background an allowance for general contingencies of ½% per year to retirement, that is to say an addition of only 1,5% per year to the net capitalization rate will be unduly favourable to a claimant. It follows that when dividend yields in the share market are significantly above

3,5% then the deductions for general contingencies should, in theory, be increased above ½% per year to retirement, possibly to as high as 1% per year. This same conclusion follows from the consideration that there are bargain-price investments to be had on the stock exchange.[90] It is useful to bear in mind that when prices are low, and prospective yields are high, the market is discounting the prospect of larger-than-usual future business risks. Whether one justifies the lower awards for damages for loss of earning capacity or support by reference to investment returns or by reference to risk and general contingencies is, in the final analysis, immaterial. The end result is a price, a single once-and-for-all lump-sum amount of money.

[9.4] CONCLUSION

The deduction for general contingencies is an important component of what one may call 'the forensic pricing mechanism'. Utility theory suggests that this adjustment will almost always be a deduction. In theory the adjustment for risk is best effected by increasing the discount rate of return. In practice a percentage deduction from the actuarial value generally gives much the same result.

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[90] An unusually high dividend yield on the FT-actuaries all-share index will generally indicate that share prices are unusually low.

CHAPTER 10

LOSS OF USE

***Summary**: Interest is the measure of loss for deprivation from the use of money. The loss of use of goods can generally be quantified by interest on the value of the goods subject to an adjustment for the rate at which the goods increase or decrease in value with the passage of time. A court is competent to award damages expressed in terms of a foreign currency. The rate of mora interest should then be adjusted to that appropriate to the relevant foreign economy.*

[10.1] INTRODUCTION

[10.1.1] Money and goods: Within the context of damages for loss of earnings or support the question of loss of use only arises as regards loss of use of money. However, there is a general presumption in law, based on considerations of mitigation, that when goods are destroyed the owner is expected immediately to purchase substitute goods thereby confining his loss to a loss of money.[1] For this reason, and the benefit of comparison, the discussion will not be confined to loss of use of money.

[10.1.2] Inadequacies in the law: The common law tends to deny that the use of goods or money has value.[2] Neither loss of interest nor loss of buying power will be allowed as an addition to past losses.[3] *Furtum usus* is not a common-law crime.[4] Compensation for loss of use of capital has been subjected to an onerous burden of proof.[5] The phenomenon is not confined to South Africa. In England the courts had long been empowered to award interest on damages for personal injury and death[6] but no such awards were made.[7] Legislation was

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[1]See footnote 2.

[2]*General Accident Insurance v Summers* 1987 3 SA 577 (A) 613B 'Dit is natuurlik waar dat indien 'n voertuig wat sê maar R20000 werd is op 'n sekere dag vernietig word en die eienaar daarvan eers drie jaar later by die verhoor daardie bedrag as skadevergoeding toegeken word, hy eintlik nie ten volle vir sy skade vergoed word nie. Hy het immers die gebruik van R20000 vir drie jaar ontbeer, maar hierdie ongelukkige gevolg is daaraan te wyte dat die reg blykbaar aanvaar dat die eienaar op die dag van die delik 'n ander ewe goeie voertuig vir R20000 sou kon gekoop het, of hy dit kon bekostig het of nie, en dat sy skade dus nie meer as R20000 kan wees nie'. Stoll & Visser 1990 *De Jure* 347 349 'The South African law on the loss of use appears, in certain aspects, to be underdeveloped'; see too Neethling Potgieter & Visser 'Deliktereg' 2ed 231n232; Reinecke 1988 *De Jure* 221 236-7.

[3]*SA Eagle Insurance v Hartley* 1990 4 SA 833 (A).

[4]*R v Sibiya* 1955 4 SA 247 (A). This lacuna in the law was subsequently filled by s1(1) of Act 50 of 1956.

[5]*Broderick Properties v Rood* 1964 2 SA 310 (T) 316A-F.

[6]s3(1) of the Law Reform (Miscellaneous Provisions) Act 1934.

[7]McGregor 'Damages' 14ed 338 'Before 1970 it was not the practice to make awards of interest on damages in claims arising out of personal injury and wrongful death'.

then introduced in 1969 to render compulsory the award of interest on damages.[8]

[10.1.3] Exceptions: On the positive side one can point to a number of judgments which have taken a more progressive view regarding loss of use: 'Interest is the lifeblood of finance' it has been said.[9] Interest on past losses has been awarded by agreement between the parties.[10] Compound interest, interest on interest, is no longer prohibited.[11] Past loss of use of a motor car has been compensated[12] as too has the rental value of premises which could not be occupied for a while.[13]

[10.1.4] Loss of utility: A primary theoretical objection to awarding compensation for loss of use is the differencing principle in its classical formulation by Mommsen.[14] A simple comparison of assets before and after deprivation of use reveals no loss because the assets have at all times remained part of the victim's patrimony. This is particularly true of a measure of damages which focuses upon money that actually changes hands. Van der Walt has pointed to the inadequacy of the traditional globular differencing technique.[15] That there can be a substantial loss of utility is illustrated by the example of the spilt mug of beer.[16] If a substitute mug of beer is not immediately purchased then there is a loss of the utility, the pleasure of drinking that beer. If a substitute mug of beer is purchased then the loss of pleasure becomes a loss of money. Deprivation of the use of a motor car can be made good by hiring a substitute motor car. But, just as with the spilt mug of beer, there is a loss of utility even if the monetary expense is not incurred. The problem lies in assigning a monetary value to the use of goods when no expense is explicitly incurred.[17]

[10.2] ASSESSMENT METHODOLOGY

[10.2.1] Cost of hiring a substitute: On the one hand one can argue that the notional cost of hire is a fair measure. On the other hand one may argue that if the claimant was not motivated to incur the expense then the utility to the claimant of the use of the car must be less than the hire cost. This presumes, of course, that the claimant has the means whereby to pay the cost of hire. The assessment of damages usually ignores the personal utility of

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[8] s22 of the Administration of Justice Act 1969 amended s3(1) of the Law Reform (Miscellaneous Provisions) Act 1934. See *Jefford v Gee* [1970] 1 All ER 1202 (CA) for a comprehensive commentary on the new legislation.

[9] *Linton v Corser* 1952 3 SA 685 (A) 695G; *Bellairs v Hodnett* 1978 1 SA 1109 (A).

[10] *Legal Insurance v Botes* 1963 1 SA 608 (A) 622E.

[11] *Davehill (Pty) Ltd v Community Development Board* 1988 1 SA 290 (A) 298H-I.

[12] *Shrog v Valentine* 1949 3 SA 1228 (T); *Castle & Castle v Pritchard* 1975 2 SA 392 (R); *Modimogale v Zweni* 1990 4 SA 122 (B) 135H; 1993 2 SA 192 (BA); *Smit v Abrahams* 1992 3 SA 158 (C).

[13] *Monumental Art Co v Kenston Pharmacy* 1976 2 SA 111 (C) 124A (9 days).

[14] Mommsen '*Obligationenrecht*' (1853) vol 2 3; *Union Government v Warneke* 1911 AD 657. See 58. above.

[15] Van der Walt 'Sommeskadeleer' 181 184-5 241-5; Bloembergen '*Schadevergoeding*' 26-7.

[16] Bloembergen '*Schadevergoeding*' 17.

[17] Stoll & Visser 1990 *De Jure* 347 349-53 discuss the German experience in this regard.

the claimant in favour of a general communal standard of value.[18] This latter consideration suggests that the rental value of the goods is a fair and proper measure of the lost utility of use.[19]

[10.2.2] Unused goods: What of the owner who does not use his asset? By way of analogy loss of earning capacity is compensated by reference to the earnings likely to be generated by the use of the capacity to work.[20] If there was little likelihood that a victim would have worked then there will be no compensation for loss of earning capacity. This suggests that evidence indicating non-use is a ground for denying compensation for loss of use. From the point of view of an employer, however, an employee may be paid a salary merely to be on standby.[21] Similarly a car may be used only intermittently. Its usefulness derives from its availability as and when it is needed. A good deal of money may be paid for availability without use.[22] The true measure of the utility of use is the rate which the owner, in the absence of litigation, would have agreed to part with the availability of the goods. Evidence of such a personal value is seldom, if ever, available.

[10.2.3] Tradeable goods: An injured victim who loses part of his bodily functions will be compensated by an award of general damages. Although such awards are generally viewed as non-patrimonial they do have a patrimonial quality.[23] Deprivation of the use of goods impinges on the quality of life of the owner. Injury and upset relating to commercially tradeable goods such as a car, ship, or a mug of beer, can generally be relieved by acquiring suitable substitute goods either by purchase or by hire. This consideration suggests two things:

* The disutility of loss of use has a patrimonial quality for which a value can be objectively determined.[24]
* The reasonable cost of substitution, even if not explicitly incurred, is a fair measure of

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[18]Voet '*Ad Pandectas*' 45.1.9 '*Illud extra dubium est, in definiendo eo quod interest, neutiquam affectionem peculiaris rationem habendam esse, sed communem, ut ita dicam, affectionem oportere spectari*'. See too 22. above.

[19]Stoll & Visser 1990 *De Jure* 347 353 record that German courts have been unwilling to award compensation for loss of use except when an expense has actually been incurred and this was necessary to avoid an equally large or even larger pecuniary loss. In *Monumental Art Co v Kenston Pharmacy* 1976 2 SA 111 (C) 124A damages were awarded, by agreement between the parties, for the rental for the damaged premises for 9 days. The claimant had not incurred the expense of alternative premises and the award was thus for wasted rental costs.

[20]*Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1020; *Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D 'verwagte inkomste'.

[21]'They also serve who only stand and wait' from 'On his blindness' by John Milton.

[22]McGregor 'Damages' 14ed 701-2 cites a number of judgments where damages were awarded for loss of use of ships kept available but not in use. The damages were assessed as interest on the value of goods. This is a fair measure provided the value of the asset remains constant in nominal terms with the passage of time.

[23]Awards for general damages must maintain a sensible relationship with the reasonable costs of partially relieving the victim's condition (see 259).

[24]*Edwards v Hyde* 1903 TS 381 385-6 suggests that provided adequate evidence is led then a claim for patrimonial loss will be allowed. In this instance the wrongful detention of pigs for a brief period would have given rise to a negligibly small value quite apart from the advantage that the pigs were being cared for elsewhere with possible savings in the need to clean pens and to feed the pigs.

the loss suffered.

[10.2.4] Non-tradeable goods: Not all goods are commercially tradeable. Highly specialized equipment cannot be immediately replaced. Family heirlooms may have a low commercial value but high utility for the owner. Sentimental value may become commercialized, as with antiques, or the personal possessions of famous people. Considerations of objectivization and mitigation suggest that a claimant must in general make do with the objective commercial value as the basis for the calculation, the value generally recognized by one's fellow men.[25]

[10.2.5] Investment rates of return: The English courts have calculated the damages for loss of use of unmarketable and unused assets as interest on the depreciated cost of the goods.[26] Interest is the cost of acquiring the use of money. It is the rental value of money. It is a fair measure of the rental value of other goods only if the value of such goods depreciates at the same rate as does money. If the goods increase in value in line with inflation then one should use a real rate of return such as 2,5% per year, not a nominal rate of interest. On the other hand some goods, such as a motor car, will depreciate faster than money.[27] One should then use a nominal rate of interest of, say, 16% per year on the current value *plus* the rate of depreciation.[28] On the other hand if the value of the asset is increasing with the passage of time then the use value would be the nominal rate of 16% per year **less** the rate of increase in value. Where the rate of increase exceeds the rate of inflation the court may be justified in allowing at least a real rate of return. However, if the asset was being held solely as a store of value[29] then there would be no use value at all, the sole consideration being that the asset is safe and undamaged.

[10.2.6] Running costs: Lee & Honoré[30] states as regards transportation:

> 'Damages should be assessed as the difference between the cost of substitute transport and the usual running costs of the damaged vehicle'.

The notional substitute transport may, however, be superior or inferior to what has been lost and its cost thus not necessarily a fair measure of the utility of use of the goods damaged. Where the expense of substitute transport has been incurred this would be measured according to considerations of reasonableness and mitigation. One cannot expect to be compensated for the cost of hiring an expensive mercedes benz motor car if the damaged vehicle was a small cheap city golf. An expense somewhat greater than the basic utility of use of the damaged goods may well be acceptable if this prevented an even greater loss of

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[25]See 22.

[26]McGregor 'Damages' 14ed 701-2.

[27]The Automobile Association allows for 4.3% per year depreciation on purchase cost in their tables giving cost per kilometre of running a motor car. Some prestige vehicles may increase in value relative to the original purchase cost but probably below the rate of inflation. Vintage cars on the other hand, may well appreciate faster than the rate of inflation.

[28]See footnote 27.

[29]As with Kruger Rands, undeveloped plots of land, etc.

[30]Lee & Honoré 'Obligations' 252; Boberg 'Delict' 627.

business profits.[31] The same, it seems, would apply to costs incurred to save life and health.[32] Lee & Honoré maintains that 'the usual running costs of the damaged vehicle' should be deducted. This deduction would only be appropriate if the 'usual running costs' had fallen away as a result of the wrongful act. Licence and insurance costs and depreciation may well continue unabated. Additional depreciation flowing from the damage to the vehicle will be compensated if this is not made good by the repairs.[33]

[10.3] THEORETICAL ANALYSIS

[10.3.1] Anomalous legal principles: In general a claimant is obliged to mitigate his damages. Thus if his motor car has been destroyed he is expected to purchase immediately a substitute vehicle.[34] It then follows, in theory at any rate, that his loss is the cost of replacement, the market value at the date of the delict. His loss ceases to be the loss of a car and becomes a loss of money, the cost of purchasing the replacement car. The loss of the use of the car is substituted by a loss of use of money.[35] The indications are that under South African law compensation will be awarded for the temporary loss of use of goods where substitution is by way of hire.[36] However, when there is total destruction of the goods, the date-of-delict rule would seem to come into play.[37] The rule against interest on damages[38] then denies the claimant compensation for the loss of the use of the money notionally used to acquire the substitute goods.[39] The relevance of interest calculations to the rental value of goods has been discussed above.[40]

[10.3.2] Date-of-delict rule: In general it has been said that a claimant's duty to mitigate does not impose on him 'an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business'.[41] One may thus question the

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[31] *Shrog v Valentine* 1949 3 SA 1228 (T) 1229; *Modimogale v Zweni* 1990 4 SA 122 (B) 135H; 1993 2 SA 192 (BA).

[32] In *Castle & Castle v Pritchard* 1975 2 SA 392 (R) the costs of air fares from Rhodesia to Durban were not disputed after the car had been seriously damaged far from home.

[33] *Erasmus v Davis* 1969 2 SA 1 (A); Boberg 'Delict' 637.

[34] *General Accident Insurance v Summers* 1987 3 SA 577 (A) 613B quoted in footnote 2 above. See earlier discussion of this issue at 24 above.

[35] Bloembergen '*Schadevergoeding*' 55 62 notes that at the date of the delict the damaged goods are replaced by an action for damages. This is, however, a technical tautology that provides little assistance with solving the problem in equity.

[36] *Shrog v Valentine* 1949 3 SA 1228 (T) 1129; *Modimogale v Zweni* 1990 4 SA 122 (B) 135H; 1993 2 SA 192 (BA); *Smit v Abrahams* 1992 3 SA 158 (C).

[37] *Philip Robinson Motors v NM Dada* 1975 2 SA 420 (A) 429F; *Heath v Le Grange* 1974 2 SA 262 (C) 263C/D; *Monumental Art Co v Kenston Pharmacy* 1976 2 SA 111 (C) 118G.

[38] *Victoria Falls & Transvaal Power v Consolidated Langlaagte Mines* 1915 AD 1 32; *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A).

[39] See footnote 2.

[40] See paragraph 10.2.5.

[41] *Asamera Oil v Sea Oil & General* (1978) 89 DLR (3d) 1 (SCC) 20. *Novick v Benjamin* 1972 2 SA 842 (A) 858B-C 'The duty to mitigate would go no further than to require the innocent party to act reasonably in all the circumstances, the *onus* of proof being on the defaulting party'. See Kerr 1986 *SALJ* 339.

existence in South African law of a general rule that damages be assessed as at the date of the delict. The two main decisions on the subject[42] were concerned with persons who traded in the goods concerned and could reasonably be expected to effect immediate replacement. With depreciating assets such as motor cars[43] it is generally in the claimant's favour to fix the value at the date of the delict.[44] If replacement is to take place at date of trial then this should be with a vehicle of depreciated value comparable to that which the damaged vehicle would have had, had it not been damaged.[45] The problem of fairness to the claimant only arises when the cost of substitution has been increasing during the pre-trial period.[46] Boberg[47] says of the date-of-delict rule that 'Since the alleged rule has no meaning (apart from expressing the concept of a collateral source), it is suggested that it be discarded'. However in *Voest Alpine Intertrading v Burwill*[48], an action for breach of contract, the damages were fixed according to exchange rates at the date of breach.[49] In *SA Eagle Insurance v Hartley*[50] damages for past loss of earnings were pegged at the date of the loss without regard for subsequent loss of buying power. Despite what Boberg has said the date-of-delict rule still has a draconian stranglehold on South African concepts of justice.

[10.3.3] Trading costs: What of the claimant who has had to pay commission or a purchase tax in order to acquire substitute goods? Will this cost be allowed in addition to the basic market value of the goods? In *Wikner v TPA*[51] the court refused to add general sales tax to the damages suffered despite the fact that if the claimant had actually purchased substitute goods he would have incurred this cost. The court reached this conclusion having regard to the money value of the claimant's patrimony and ignoring the fact that the claimant was being provided only with money, and not a motor car. Had the court sought to restore the utility of the patrimony by providing a substitute motor car then general sales tax should have been added to the compensation money. It would have been appropriate to apply a deduction for the contingency, if any, that the claimant would have been able to buy a substitute vehicle free of sales tax. The claimant was not compensated for the loss of the use of the vehicle

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[42]*Philip Robinson Motors v NM Dada* 1975 2 SA 420 (A) 429F; *Monumental Art Co v Kenston Pharmacy* 1976 2 SA 111 (C) 118G.

[43]See footnote 27.

[44]The judgment in *Modimogale v Zweni* 1990 4 SA 122 (B) is somewhat vague as to whether the cost of replacement was taken at the date of the delict or the date of the trial.

[45]Although the prices of new cars increase over the years justice does not require that a claimant should be provided with a new vehicle in substitution for an older vehicle.

[46]See, for instance, *Birmingham City v West Midland Baptist (Trust)* [1969] 3 All ER 172 (HL).

[47]Boberg 'Delict' 487inf 625.

[48]1985 2 SA 149 (W).

[49]The court indicated (at 151C) that the additional loss due to currency fluctuations might have been claimable as an additional head of damages had it been argued. This comment would seem to have in mind consideration of fault in the conduct of the proceedings, ie a claim for what is more in the nature of costs of litigation than damages (*Union Government v Jackson* 1956 2 SA 398 (A) 416E 417-18).

[50]1990 4 SA 833 (A).

[51]1992 (T) (unreported 4.6.92 case no 17826/91).

during the pre-trial period. However, he was awarded the value at the date of the delict and thus spared the cost of depreciation, this being part of the use value.[52]

The *Wikner* ruling highlights one of the differences between *damnum emergens* and *lucrum cessans*.[53] The sales tax is *damnum emergens* whereas the loss of the proceeds of the sale is *lucrum cessans*. There is no reason why the claimant should not have been awarded the value of the chance of incurring the expense of sales tax.

[10.3.4] Value encapsulates all use options: The market value at which goods can be purchased includes full allowance for the present value of the utility of the future use of such goods **in all its variety.**[54] This consideration has the important rider that the calculated present value of the use value of goods should not exceed the lump-sum market value of those goods. Otherwise stated the discounted present value of future notional rentals less future notional expenses should not exceed the market value of the goods. If it does then something has gone wrong with the calculations.

[10.4] INTEREST AND DAMAGES

[10.4.1] Single undivided debt: Interest is the rental one pays for the use of money. It has been held that no interest may be claimed on a debt which can only be ascertained after a long and complicated inquiry.[55] This ruling took the view that the damages were a single undivided debt which arose at the date of the delict and for which the claimant then sued. Separate heads of damage are merely the reasoning by which a court arrived at the overall figure.[56] The Roman-Dutch jurists may well have distinguished between a debt and a claim for damages.[57] The modern South African law has, it seems, abandoned any such distinction.[58] For most practical purposes the distinction is not material for damages arising from late payment of damages were not awarded in Roman-Dutch times.[59]

[10.4.2] A series of separate pseudo-debts: The distinction between debt and damages does become apparent, however, if damages for a continuing loss is viewed as a series of separate monthly, or weekly, losses. The appellate division has abandoned the traditional view of damages as an undivided debt and elected instead to view damages for loss of earnings or

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[52]See paragraph 10.2.5.

[53]See 46.

[54]Bloembergen '*Schadevergoeding*' 47.

[55]*Victoria Falls & Transvaal Power v Consolidated Langlaagte Mines* 1915 AD 1 32; *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A).

[56]*Van der Plaats v SA Mutual Fire & General Insurance* 1980 3 SA 105 (A) 118G.

[57]*Jefford v Gee* [1970] 1 All ER 1202 (CA) 1207d 'In Scotland... the courts followed the civil law... (They) drew a distinction between *debt* and *damages*'.

[58]*Victoria Falls & Transvaal Power v Consolidated Langlaagte Mines* 1915 AD 1 32 'The civil law did not attribute *mora* to a debtor who did not know and could not ascertain the amount which he had to pay'. *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A).

[59]Voet *Ad Pandectas* 45.1.11; Van Bynkershoek *Obs Tumultuariae* 1478.

support as a series of separate debts,[60] one for each weekly or monthly loss of earnings, one for each purchase of analgesic pills. This was done, it seems, to avoid a general relaxation of the date-of-delict rule when wanting to discount future loss of earnings and support to date of trial. The 'separate debts' approach is highly artificial in that is disregards the effect of contingency deductions and value of a chance in respect of past and future indebtednesses. With true debt the cause of action arises once the due date for payment has passed and payment has not been made.[61] With Aquilian damages for personal injury and death the cause of action usually arises as at the date of the wrongful act. As from that date the claimant has a right of action for all losses flowing from the wrong, albeit the discounted present value thereof.

With a claim for damages prescription runs in respect of the single indivisible sum of the damages. With true debts prescription runs separately for each separate amount that has fallen due and remained unpaid. The appellate division has created a theoretically untenable state of affairs which is likely to cause problems in years to come.

[10.4.3] Liquidated damages: A distinction may be drawn between interest 'as' damages and interest 'on' damages. *Mora* interest, that is interest 'on' damages, is awarded without the need to lead evidence as to the application of the funds.[62] Interest 'as' damages will only be allowed if properly claimed and proved.[63] The most common example of interest 'as' damages would be interest charges incurred on money factually borrowed during the pre-trial period.

There is no recorded instance where interest 'on' or 'as' damages has been awarded.[64] This is surprising because there are instances where past damages are ascertainable upon reasonable inquiry.[65] Down the years the original requirement of 'reasonable inquiry' has changed into 'liquidated damages', a much more stringent test.[66] A claim for interest on past medical or prosthetic costs, if admitted, will only be allowed if the expense has been met and then only from date of payment. A claimant who incurs debt in order to survive during the pre-trial period may, in theory, claim compensation for the associated interest charges. The intellectually smothering effect of the ruling in *Hartley*'s case[67] has had the effect that

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[60] *General Accident Insurance v Summers* 1987 3 SA 577 (A) 613-14; *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 838-9.

[61] This may be in respect of single sum of money but may also arise with a series of debts such as unpaid rentals or maintenance payments. Each non-payment gives rise to a separate cause of action.

[62] *Bellairs v Hodnett* 1978 1 SA 1109 (A) 1145F '(*Mora*) interest is payable without the creditor having to prove that he has suffered loss'.

[63] *Broderick Properties v Rood* 1964 2 SA 310 (T) 316A-F.

[64] Interest has been awarded by agreement between the parties (see *Legal Insurance v Botes* 1963 1 SA 608 (A) 622E).

[65] *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1021I-J.

[66] *Probert v Baker* 1983 3 SA 229 (D) 237A 'The amount of the claim is thus capable of prompt and ready ascertainment and of speedy and easy proof; and the Court is not required to inquire into any facts or to exercise an independent judgment on any aspect such as the reasonableness of the amount'.

[67] *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A).

there probably never will be a common-law award for interest 'on' or 'as' damages.[68]

[10.4.4] Different standards of justice: When damages for future loss have been discounted to date of trial[69] then no further interest should be added to the present value of the future loss because the discounting process includes the necessary allowance for interest.[70] Some foreign legislation for interest on damages has specified that interest is to be added to the **entire** award from the date that the award fell due, that is to say from the date of the delict. In such instances discounting of all losses, past and future, should be done to date of delict.[71]

The normal practice in South Africa is that past losses are accumulated without adjustment for interest for the period between the date when the notional earnings or support would have been received and the date of trial. This accumulation of past losses without adjustment for delay reflects an economy where the disutility of delayed payment is nil. Conversely for future losses a court will assume, without the need for argument or evidence, that the claimant will invest the award profitably,[72] in other words that delay does have disutility. This difference between the treatment of past and future losses is anomalous and undesirable.

Interest on damages is allowed by statute in most western jurisdictions[73] but not in South Africa.

[10.4.5] Loss of buying power: By 'loss of buying power' is meant an add-on to past losses so that the award made has the same buying power as the claimant would have enjoyed had the amounts been received timeously. This adjustment is calculated by adding inflation to the nominal amounts that would otherwise have been awarded as damages. The adjustment for loss of buying power is to be distinguished from normal escalations in earnings to offset the effects of inflation.[74] It is made in addition to such estimates of notional nominal earnings, or support.

The rule against interest on damages includes a prohibition on adjusting past losses for loss of buying power between date of loss and date of trial.[75] This rule flows from the principle

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[68]In *Muller v Mutual & Federal Insurance* 1993 4 C&B J2-56 (C) the court came to the conclusion that the distinction between interest 'as' damages and interest 'on' damages was impractical and that a claim for overdraft interest actually paid (R65529) should not be distinguished from a claim for the prohibited interest on damages.

[69]As is the preferred practice in South Africa (*General Accident Insurance v Summers* 1987 3 SA 577 (A)).

[70]*Cookson v Knowles* [1978] 2 All ER 604 (HL) 611f-g; Koch 'Damages' 110.

[71]*Ruby v Marsh* (1975) 6 ALR 385 (HC); *Cookson v Knowles* [1978] 2 All ER 604 (HL) 611f-h; Luntz 'Damages' 2ed 492-4.

[72]*SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 838-9.

[73]For England and Scotland see *Jefford v Gee* [1970] 1 All ER 1202 (CA); for Australia see Luntz 'Damages' 2ed 493-8; for Canada see Cooper-Stephenson & Saunders 'Damages in Canada' 413-4; for France Germany and Switzerland see Mann (1985) LQR 30.

[74]*SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 840-41.

[75]*SA Eagle Insurance v Hartley* 1990 4 SA 833 (A).

of currency nominalism. The rule is unsatisfactory and is presently under consideration by the Law Commission.[76]

The Roman-Dutch law did not allow a claim for damages arising from the late payment of damages.[77]. Voet links this prohibition to the prohibition on compound interest because in Roman-Dutch times *mora* interest was viewed as a form of damages. With little evidence of debate or deep reflection the prohibition on compound interest has been revoked by judicial decree.[78] The appellate division has, however, since withdrawn from this liberal approach to judicial law making to one of extreme conservatism.[79]

[10.4.6] Use of collateral benefits: A claim for interest on damages has been refused by an English court on the grounds that the claimant had the benefit of insurance money which had not been deducted in assessing the claim.[80] The extent to which South African courts will have regard to such considerations remains to be seen, if and when legislation for interest on damages is ever passed.

[10.4.7] Fault in conduct of proceedings: If *mora* interest may be viewed as a form of damages for delayed payment then liability for such interest would depend on the wrongfulness of the conduct that gave rise to the delay.[81] Reasoning of this nature suggests that *mora* interest should not run from a date earlier than the date of the issue of summons and may be denied altogether if the court finds that the delay until date of trial is attributable entirely to the fault of the claimant. In *Muller v Mutual & Federal Insurance*[82] the delay until trial was viewed as a *novus actus interveniens*, in other words overdraft interest incurred on the debt created by the loss was viewed as not 'caused' by the wrongful act. In *Smit v Abrahams*[83] delay and impecuniosity were regarded as foreseeable. This judgment was distinguished in the *Muller* case.

[10.4.8] Interest or inflation?: Frequently a past loss of earnings or support represents an income which, had it been received timeously, would have been expended entirely on living expenses such as food, clothing or equipment. This point is well illustrated by the example of the spilt mug of beer.[84] The money would not have been invested and there can thus be no question of a loss of investment returns. Fair compensation for a mug of beer spilt three years ago is *prima facie* the price today of a mug of beer. The price at the date of the loss

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[76]*SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 841-2.

[77]Voet *Ad Pandectas* 45.1.11.

[78]*Davehill v Community Development Board* 1988 1 SA 290 (A) 298H-I.

[79]See *SA Eagle v Hartley* 1990 4 SA 833 (A) (past loss of buying power will not be compensated); *LTA Construction v Administrateur, Tvl* 1992 1 SA 473 (A) (interest may not accumulate to more than the original capital).

[80]*Harbutt's Plasticine v Wayne Tank & Pump* [1970] 1 All ER 225 (CA) 228-9.

[81]*Union Government v Jackson* 1956 2 SA 398 (A) 416E 417-18.

[82]1993 4 C&B J2-56 (C).

[83]1992 3 SA 158 (C) wherein it was held that the impecuniosity of a victim is foreseeable.

[84]Bloembergen '*Schadevergoeding*' 17.

should be adjusted for inflation to the date of the award. This presumes, of course, that the claimant did not immediately purchase a substitute mug of beer at the time and thereby convert his loss of utility into a loss of money. Many of the claims for past loss of earnings or support have the characteristic that the victims have no assets to consume nor the creditworthiness to borrow. Their past loss is pure utility comparable to the unreplaced mug of beer. One measure for compensating such a loss is the amount of money that would have been expended, usually earnings net of tax, adjusted for price escalation to the date of the award. In the absence of explicit evidence as to what would have been purchased the rate of inflation as measured by the consumer price index for all classes will usually be a fair basis for escalating the original monetary amount.

It can be argued that interest is the reward for deferring expenditure on goods and services. It then follows that proper compensation for past loss of utility is not merely the present cost of acquiring the goods or services but also the addition of a real rate of return to compensate for the disutility of being kept out of spending the money on real goods and services. This is the same thing as saying that interest, not just inflation, should be added to past losses. It deserves note that in England awards for general damages are increased by a real rate of return in addition to an adjustment for inflation.[85] I have also noted that the English measure for the loss of use of goods is notional interest on the value of those goods.[86] The same consideration, it seems, holds good for the loss of the use of money.[87]

[10.4.9] Notional borrowings: If there has been a loss of investment opportunity then the expected investment rate of return is the proper basis for adjustment. If the claimant has borrowed money in order to maintain his standard of living then the cost of borrowing such money would be the proper measure. But what of the claimant who has been lent money interest free? Should the defendant's liability not be determined as though the money had been formally borrowed in an 'arms-length' transaction? And what of the claimant who has dispensed with borrowing altogether by adopting a cheaper standard of living during the pre-trial period? Should the defendant's liability not be determined as though the normal standard of living had been maintained by full borrowing at interest? The prevailing practice for calculating past loss of earnings[88] or support presumes that the full standard of living has been maintained throughout the pre-trial period but without allowance for interest on the money notionally expended.

[10.4.10] Penalty interest: The reasoning of the previous paragraph suggests that an unqualified award of interest on past loss of earnings or support is the proper measure. It is clear that any such development must be by way of reforming legislation and not judicial

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[85]*Pickett v British Rail Engineering* [1979] 1 All ER 774 (HL) 799-800; *Birkett v Hayes* [1982] 2 All ER 710 (CA) 715a 716a 717a. The rate applied is presently 2% per year but this rate may be amended from time to time by judicial decree (*Wright v British Railways Board* [1983] 2 All ER 698 (HL) 704-5). The real rate of return in England is generally considered to be about 4% to 5% per year (see *Mallett v McMonagle* [1969] 2 All ER 178 (HL) 190-1). The rate of 2% per year may thus reflect a typical past loss calculation based on half the rate for the whole period (see 175).

[86]See 166.

[87]The same considerations apply to services gratuitously rendered (see 192 and 297).

[88]See 219.

decree.[89] However, if one bears in mind the role of interest as a penalty in the 'snakes and ladders' of litigation[90] then the preferable approach may be to use the rate of inflation as the fundamental basis for adjustment. The penalty is then limited to the real rate of return. In addition the court should be free to use any higher or lower rate that is established in evidence. This gives effect to the need for an objective measure for purposes of forensic efficiency coupled with a provision to enable the claimant to concretize the issues, if so desired.[91]

[10.4.11] Prescribed rate of interest: The Prescribed Rate of Interest Act[92] governs the rate of *mora* interest applicable to liquidated debts where no explicit rate otherwise applies. This statutory rate is that generally applicable to judgment debts.[93] A variety of rates have been laid down from time to time.[94] The rate applicable for the entire period of delay is that 'prescribed as at the time when such interest begins to run'. During times of widely varying rates, such as have in recent times prevailed in South Africa, this leads to rates of 12% being applied to debts long after the commercial rate has risen to 20% and more, and vice versa. The solution to this problem is the publication of an interest index[95] for each year in the same manner as is done for the consumer price index.[96] The adjustment for delay is then done in the same way as an adjustment for inflation; that is to say by increasing the debt by the ratio of the index now to the index at the time that interest commenced to run.[97]

Mora interest is, in theory, taxable income. It is doubtful that, in practice, claimants declare such income.

The Act[98] provides for simple interest. Compound interest is now permitted in terms of the common law.[99] However the rule that interest may not accumulate to more than the

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[89] *SA Eagle Insurance v Hartley* 1990 4 SA 827 (A) 842A-B.

[90] *Union Government v Jackson* 1956 2 SA 398 (A) 416E 417-18.

[91] See 31.

[92] 55 of 1975.

[93] In *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 841H passing reference is made to this legislation.

[94] 11% per year for period 16.7.75 to 8.2.85; 20% to 1.8.86; 15% to 1.9.87; 12% to 1.7.89; thereafter 18,5% per year simple interest (cf rates in table 10B at 123).

[95] Ideally based on the prime bank overdraft rate, perhaps increased by about 1% per year. The index would show the cumulative effect of compound interest (compounded monthly) at the bank rate on an initial debt of R100 at the time that the index commences.

[96] The Johannesburg Stock Exchange jointly with the Actuarial Society of South Africa already publishes interest indices in the financial press on a daily basis. This procedure could readily be adapted to provide the necessary data for mora interest.

[97] Suppose the index was 100 in 1987 when interest commenced to run and has increased to 229 by 1992 (an average 18% per year compound) this would mean increasing the debt by a factor of 2,29 with 1,29 times the debt reflecting interest.

[98] Prescribed Rate of Interest Act 55 of 1975.

[99] *Davehill (Pty) Ltd v Community Development Board* 1988 1 SA 290 (A) 298-9.

original debt, the *duplum*, continues to apply in the modern South African law.[100]

[10.4.12] Date from which interest runs: When a civil debt remains unpaid the cause of action arises at the due date for the debt. It is appropriate that *mora* interest commences to run at that date. With damages for personal injury and death the right of action is available from immediately after the injury or death has occurred. The claim lies for the discounted present value of all future *lucrum cessans* and *damnum emergens*.[101]

Mora interest on a judgment debt runs from the date that the trial court gives judgment and not from the date that the appeal court varies the award made by the trial court.[102] When there has been a split trial with liability determined at a separate and earlier hearing from the damages then *mora* interest runs from the date that the damages are determined.[103]

The fact of a payment into court does not relieve the defendant of liability for *mora* interest, and the payment should include a tender to pay interest.[104]

When calculating interest on a continuing past loss of monthly or weekly earnings or support the arithmetic may be simplified by applying the rate to the total past loss for half the period or half the rate for the whole period.[105] This short-cut method is only valid if there has been an unbroken series of losses.[106] If the past loss of earnings was for only a short period after the injury then the full rate of interest should be applied for the full period.[107]

[10.4.13] Indexation: If the parties to the action had the opportunity to contract prior to the commission of the delict they would have had the opportunity to stipulate for interest in the event of wrongful conduct. It can be argued for such claimants that a statutory provision allowing an adjustment for interest, or loss of buying power, constitutes unjustified interference with freedom of contract. Conversely one may argue that if there is freedom of contract the parties may readily agree to exclude an adjustment for inflation, should they wish to do so.[108] The South African authorities would seem to have generally discouraged the indexation of monetary liabilities.[109] This is unfortunate because indexation of liabilities does not cause inflation, it merely determines who will bear the cost of inflation.

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[100]*LTA Construction v Administrateur, Tvl* 1992 1 SA 473 (A); Otto 1992 *THRHR* 472-80.

[101]But see footnote 71.

[102]*General Accident Versekeringsmpy v Bailey* 1988 4 SA 353 (A).

[103]*Thomas v Bunn* [1991] 1 All ER 193 (HL).

[104]*Government of RSA v Midkon (Pty) Ltd* 1984 3 SA 552 (T) 567.

[105]*Jefford v Gee* [1970] 1 All ER 1202 (CA) 1208g-inf.

[106]The method also presupposes fairly even increases over the relevant period, a condition that is generally satisfied.

[107]In *Dexter v Courtaulds* [1984] 1 All ER 70 (CA) the court failed to grasp this principle and ordered that interest on such a loss be calculated according to the 'half-the-period' principle.

[108]Spandau 1975 *SALJ* 31 35-6 lists a number of deficiencies in this reasoning.

[109]The indexation provision in s4 of the Matrimonial Property Act 88 of 1984 is a rare exception to the general emphasis upon currency nominalism.

Those who hold real assets which increase in value with the passage of time, such as shares or immovable property, will profit at the expense of investors who maintain fixed deposits in building societies and banks at inadequate rates of return.[110]

[10.5] FOREIGN CURRENCIES

This topic is included under the discussion of loss of use because it involves an adjustment for the change in currency values with the effluction of time. In other words it reflects a form of 'loss of buying power'.[111]

[10.5.1] Judgment in a foreign currency: The loss of earning capacity or support suffered by a foreign visitor to South Africa is a loss of financial benefits in another country. The damages should be determined in accordance with the inflation rates and investment opportunities prevailing in that foreign economy.[112] This implies that judgment for damages should be given in a foreign currency and that the rate of exchange for converting the currency is that prevailing on the date that payment is made.[113] A contrary view has been expressed in the *Voest Alpine* case[114] but this seems to be an isolated instance. The *Hartley* case[115] has emphasised currency nominalism and the principle that a debt owing is not adjusted for subsequent changes in 'currency values', notably inflation. It remains arguable that a debt in a foreign currency is fixed in terms of that currency. It then follows that conversion at the date of trial does not offend against a rule of currency nominalism.[116]

[10.5.2] Mora interest: Foreign economies have different rates of interest from South Africa. Strictly speaking the appropriate 'legal rate of interest' for such claims is that prevailing in the foreign economy. The differential between South African and foreign interest rates will often reflect the yearly rate of decline of the South African rand relative to the other currency. In the absence of express evidence as to the foreign 'legal rate' some degree of equity will generally be achieved by applying the South African 'legal rate' to the debt converted to South African rands using the rate of exchange that prevailed at the time that interest commenced to run. If the foreign 'legal rate' is to be used then this should be applied to the debt expressed in the foreign currency.

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[110]Particularly after payment of income tax.

[111]See paragraph 10.4.4.

[112]The high cost of living in many foreign countries, such as Japan, coupled with a weak South African rand can give rise to awards which, after conversion, are staggeringly high by South African standards.

[113]As was done for a claim for loss of support in *Infolsdottir v Mutual & Federal Insurance* 1988 (SWAZI) (unreported 27.5.88 case 1054/86). See too *Murata Machinery v Capelon Yarns* 1986 4 SA 671 (C); *Elgin Brown & Hamer v Dampskibsselskabet* 1988 4 SA 671 (N) (3 judges); *Makwindi Oil Procurement v National Oil* 1989 3 SA 191 (Z). See too Neethling Potgieter & Visser 'Deliktereg' 2ed 228n206.

[114]*Voest Alpine Intertrading Gesellschaft v Burwill* 1985 2 SA 149 (W). Discussed by Radesich 1987 *THRHR* 233-7.

[115]*SA Eagle Insurance v Hartley* 1990 4 SA 833 (A).

[116]The reference in *SA Eagle v Hartley* (at 839F) to *Voest Alpine Intertrading Gesellschaft v Burwill* 1985 2 SA 149 (W) would seem to directed purely at the statement that the quantum of a debt should not be altered by the date at which one chooses to exact it, and not by any intention to confirm the decision made by the court.

[10.6] CONCLUSION

Interest is the measure of loss for deprivation from the use of money. The loss of use of goods can generally be quantified by interest on the value of the goods subject to an adjustment for the rate at which the goods increase or decrease in value with the passage of time. Interest 'on' damages and interest 'as' damages are not permitted under South African law.

A court is competent to award damages expressed in terms of a foreign currency. The rate of mora interest should then be adjusted to that appropriate to the relevant foreign economy.

CHAPTER 11

COLLATERAL BENEFITS

***Summary**: Before dealing with the actions for personal injury and death it is useful to examine the impact of collateral-benefit rules upon the distribution of the costs of damage within the community at large. A comprehensive approach to damages requires the deduction of insurance and employment benefits. A court making an award of damages should specify that a claimant should reimburse certain welldoers, including an employer. Benefits provided by the State are not gratuitous and are generally deducted.*

[11.1] INTRODUCTION

I conclude this thesis with chapters on damages for personal injury and damages for loss of support. The subject of collateral benefits cuts across both these concluding chapters[1] and would seem to be best dealt with in a chapter of its own. When a death or injury occurs the event not only brings about losses but also compensating advantages that have the effect of reducing the overall loss suffered. The substantive law requires that a number of these compensating advantages be ignored when assessing the damages. There are three main classes of collateral benefit: 'insurance benefits', 'gratuitous benefits', and 'pigeonholed' benefits.

[11.1.1] Grounds for deduction: In general a claimant who has received from a collateral source money or valuable benefits, or the right to such advantages, cannot complain if the present value thereof is deducted when assessing his damages. He has had the benefit thereof. Money, regardless of its source, has utility, often very high utility. The overall utility of the claimant's life plan is substantially enhanced by the provision of collateral benefits. It follows that as a general rule such benefits should be brought into account when assessing the damages.

The present utility of such benefits may be reduced by reason of uncertainty or by reason of a sense of obligation, moral or legal, to repay such benefits to the welldoer who has provided them. It would not be unfair on a claimant who argues for non-deduction to expect him to provide explicit evidence of those collateral benefits which are subject to a moral or legal obligation to repay, and to confine non-deduction to such benefits. A major criticism of the prevailing approach by the courts to some collateral benefits is that a defendant is denied the right to lead evidence that repayment will not take place, or to cross-examine the claimant in that regard. In cases of doubt it would be appropriate to allow a deduction from the damages for the value of the chance of non-repayment.

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[1]Reinecke 1988 *De Jure* 221 222 'Die probleem van voordeeltoerekening doen hom op die hele terrein van die skadevergoedingsreg voor'.

[11.1.2] Justifiable non-deduction: Evaluation of the rules governing collateral benefits reveals that some of the rules against deduction are highly desirable. For instance it is clearly desirable that an insurer's right of recourse be protected.[2] The death of a breadwinner transfers liability for support within the extended family unit without giving the substituted breadwinner a right of action for compensation.[3] Justice is achieved by ignoring the fact of the substitute support.[4] Persons who act in terms of a duty of support reflect a special class of welldoers.[5]

[11.1.3] Micro- and macro-economics: The subject of collateral benefits echoes a general tension in society between the needs of the individual and the needs of the community at large.[6] Van der Walt[7] perceives the function of insurance to effect compensation and the function of law to determine which members of the community will bear the cost.[8] He points out[9] that conclusions will differ depending on whether one considers the community at large or the individual. An important function of the courts is to uphold the rights of the individual. These rights are concretized in the form of contracts of insurance; contracts of employment, and acts and regulations governing a statutory insurer such as the MMF. Is it proper for a court to have regard to macro-economic considerations of overall cost to the community at large? The traditional problem solving skills of the lawyers are focused upon analysis of contracts and statutes, not macro-economics. This consideration may explain the prevalence of such reasoning as 'The wrongdoer may not benefit from insurance for which the claimant has paid'[10] instead of the macro-economic view which would focuses upon the overall cost to the community at large and says instead 'The victim is compensated at the expense of the community at large'.[11] Corbett & Buchanan state that:

> 'Awards must take into account the state of economic development of the country,

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[2]*Ackerman v Loubser* 1918 OPD 31 36; Van der Walt 'Sommeskadeleer' 452; Van Niekerk 1976 *Codicillus* 20-4 discusses the right of recourse by the insurer of an employer against an employee who has caused damage. See 187 below.

[3]With personal injury the law does accord such persons a right of action *eo nomine* (*Schnellen v Rondalia Assurance* 1969 1 SA 31 (W); see discussion at 193 below).

[4]*Groenwald v Snyders* 1966 3 SA 237 (A) 247A-D. Although this principle is desirable in general its application in *Groenewald v Snyders* to support provided from surplus life insurance money is questionable.

[5]See 193.

[6]Van der Walt 'Sommeskadeleer' 230; see too Van der Walt 1980 *THRHR* 1 24.

[7]See previous footnote.

[8]In general see Atiyah 'Accidents Compensation & the Law' 3ed 582-613.

[9]Van der Walt 'Sommeskadeleer' 215.

[10]*Parry v Cleaver* [1969] 1 All ER 555 (HL). The emphasis upon a denial of benefit to the 'wrongdoer' has strong punitive overtones (see in particular at 558C-D).

[11]Perhaps the most colourful exposition of the macro-economic approach has been the reference to the body of policy holders of insurance companies as 'the whipping boys of the twentieth century' *Browning v The War Office* [1962] 3 All ER 1089 (CA) 1094I. The macro-economic views of Trollip JA in South Africa (*Bay Passenger Transport v Franzen* 1975 1 SA 269 (A) 274-5; *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 173-4) have had remarkably little impact on the substantive law. There are exceptions (*Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1087G-H).

> and should tend towards conservatism. In circumstances of doubt and difficulty, defendants are to be regarded with greater favour than plaintiffs. In short the figure of justice carries a pair of scales, not a cornucopia'.[12]

There is some doubt that this passage provides an accurate description of prevailing judicial attitudes in South Africa:[13] When faced with doubt and difficulty in the *Byleveldt* matter the appellate division opted for non-deduction[14] whereas adherence to Corbett & Buchanan's directive would have meant deducting the disputed salary payments; In the absence of evidence it has been presumed by the court that a collateral benefit is *res inter alios acta* and that it should not be deducted;[15] a court has refused to make a deduction for the chance that a medical expense will not arise.[16] It seems true to say that there is a growing modern ethic, certainly not universal,[17] that in cases of doubt and difficulty claimants are to be preferred to defendants. This ethic is undoubtedly reinforced by dissatisfaction with the once-and-for-all lump-sum system of compensation.[18] Suffice it to say that the South African judiciary are divided on this important aspect of policy as regards the assessment of damages.

[11.1.4] The role of large institutions: It is rare for an uninsured defendant to be brought before the civil courts. Common sense says that one just does not sue an impecunious wrongdoer, and men of reasonable means will generally seek to protect their patrimony by way of insurance.[19] The modern law of damages for personal injury and death is thus concerned primarily with actions against large financial institutions with substantial financial resources. Such institutions, particularly in South Africa, have monopolistic powers which enable them to recover from customers or taxpayers or policyholders the costs of meeting the claim for damages.[20] **The distributive nature of an active economy can be expected**

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[12]Corbett & Buchanan 3ed 6.

[13]Visser 1986 *De Jure* 207 216-17 discusses conservatism in relation to awards for general damages.

[14]*Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 153. The prospect of double compensation ('dubbel vergoed sou word') was here perceived to be the lesser of two evils.

[15]*Maroso v SA Eagle Insurance* 1987 3 C&B 638 (W) 642-3.

[16]*Pallas v Lesotho National Insurance* 1987 3 C&B 705 (ECD) 713. A plaintiff will not be denied compensation for a possible loss (*Blyth v Van den Heever* 1980 1 SA 191 (A) 225-6). Even-handed justice would apply the same principle in a defendant's favour if there was a possibility that the loss would not arise.

[17]One may point to many modern judgments in the traditional mould, eg *Dippenaar v Shield Insurance* 1979 2 SA 904 (A); *Southern Insurance v Bailey* 1984 1 SA 98 (A); *Santam Insurance v Ferguson* 1985 4 SA 843 (A).

[18]See, for instance, *Wade v Santam Insurance* 1985 1 PH J3 (C); *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 64 '...if defendant were concerned at all about the risks I have mentioned which attach to the insurer in a lump sum situation, defendant could have taken steps to minimise these by resorting to the procedures stipulated in section 8(5) of Act 84 of 1986. This defendant has not done' (payment by instalments). More generally see Van der Walt 'Sommeskadeleer' whose principal theme is the abolishment of the once-and-for-all lump-sum system of compensation; Boberg 'Delict' 598-9.

[19]Atiyah 'Accidents Compensation & the Law' 3ed 260 271.

[20]*Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1087G 'The award I propose making comes ultimately from the taxpayer's pocket'; see too *Browning v The War Office* [1962] 3 All ER 1089 (CA) 1094; *Kandalla v BEA* [1980] 1 All ER 341 (QB) 349; 1981 *SALJ* 1 6; *Rowley v London & North Western Railway* [1861-73] All ER Rep 823 (Exch) 829-30 'the defendants most liable to such actions will not be able to carry on their business upon the same

to pass on the cost directly or indirectly to all members of society as part of the overall cost of living.[21] The only relief for 'society' in this broader sense is a reduction in the overall cost of damages claims. Escalation in awards for damages will influence the rate of inflation which will in turn influence the awards for damages. Damages awards are but one of the many costs of living that drive inflation.[22]

It has been said that the *Lex Aquilia* contemplates the payment of damages by the wrongdoer and no-one else.[23] The conclusion sought to be drawn from this observation was that compensating advantages should be ignored because they would lessen the liability of the wrongdoer by distributing the loss more widely. The focus here is on burdening the wrongdoer with as large a liability as possible, rather than concern for comprehensive compensation for the victim. Such a consideration is clearly punitive. It is useful to bear in mind in this regard that when the *Lex Aquilia* was first passed over 2000 years ago it had a mixed purpose being both punishment and compensation. The modern Aquilian action is, in theory at any rate, no longer punitive.[24]

[11.1.5] Abdication of judicial responsibility?: It has been argued that it does not matter what decision a court makes, the system will adjust accordingly.[25] One thing is clear, whatever decisions the courts make the large institutions, including government, always have it within their power to stipulate contractually for a right of recovery or to legislate that certain collateral benefits should be deducted.[26] If government and the large institutions are indifferent to taking steps to protect the public purse why should the courts shoulder the burden? The government in South Africa has certainly, to date, shown little interest in keeping down the cost of damages to the public.[27] The primary concern of the courts is surely to protect the rights of the underdog? But is this the limit to judicial responsibility? The underdog includes not only the claimant before the court but also the voiceless mass of the general public who are not represented before the court. Should the courts not have

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terms to the public as now'.

[21]Through the pricing mechanisms (premiums, mark-ups on sales, taxation) by which such institutions obtain funds from the public at large: Atiyah 'Accidents Compensation & the Law' 3ed 212 533 539 542; *Parry v Cleaver* [1969] 1 All ER 555 (HL) 579D-E; *Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1087G.

[22]*Moekoena v President Insurance* 1990 2 SA 112 (W) 116A4 116D4. For the financial year ended April 1987 total liability for payments in respect of motor accidents was R291 million (Department of Transport Statistics for 30/04/89). If the cost of claims were to increase roughly in line with inflation this would suggest a cost for claims in the 1990/91 financial year of R500 million. Payments under social pensions for the 1990/91 financial year were budgeted at R7 billion. The cost of motor vehicle accidents is thus only about 7% of total expenditure on social welfare.

[23]*Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 152E '... eis die *Lex Aquilia* in hierdie verband vergoeding deur die delikpleger en nie deur iemand anders nie'.

[24]See paragraph 11.10.1.

[25]Atiyah 'Accidents Compensation & the Law' 3ed 588-9.

[26]Government has, for example, stipulated for itself a 6-month prescription period: s32 of the Police Act 7 of 1958; s113 of the Defence Act 44 of 1957.

[27]Assessment of Damages Act 9 of 1969 terminated the judicial practice of deducting life insurance and pension monies from the claims of dependants (Hansard 17/02/69 842-8). Wassenaar 'Squandered Assets' details a number of other examples of government financial wastefulness.

regard to their burden as well? As I have noted above a court which focuses upon the needs of the community at large will favour rules which minimize the cost to society.[28] For this reason there is a general rule against double compensation.[29]

There are a number of other objections to the philosophy of judicial abdication of responsibility, the main one being that the courts already do deduct a number of collateral benefits. If they are to cease deducting just how far is non-deduction to go? With a personal injury is there, for instance, to be no deduction for earnings in alternative employment found after the date of injury?[30] Another problem is that the amount to be recovered sometimes bears no fixed relationship to the amount deducted. Thus an employer might seek to recover from a claimant salary payments gross of taxation whereas the damages will have been assessed by deducting salary payments net of taxation. If the court does not have regard to the nature and amount of the recovery a claimant may find himself paying out to his employer more than he has received by way of damages. For this reason recoveries in terms of the Workmen's Compensation Act are limited to the relevant damages.[31] The prospect of overrecovery is a very real problem when there has been an apportionment of damages but the welldoer seeks to recover without apportioning his claim.[32] Research has indicated that the costs of enforcing a right of recourse often negate the benefits.[33]

The power vested in the courts is substantial. Many of the rules concerning the non-deduction of collateral benefits are not in accordance with common sense or intuitive concepts of damage. To determine rules of law on a haphazard basis comforted by the thought that legal subjects will just rearrange their affairs to accommodate the law is rather like the inconsiderate driver of a motor car who takes the view that other drivers have eyes and brakes and should thus adapt their behaviour to his driving. The philosophy of abdication of responsibility has the ring of an *ex-post* justification for doing nothing about a decision incorrectly made.

[11.2] INSURANCE AND PENSION BENEFITS

[11.2.1] Deduction of pension benefits: Pension benefits payable in terms of the contract of

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[28]See paragraph 11.1.3.

[29]Van der Walt 1980 *THRHR* 1 16 25. *Southern Insurance v Bailey* 1984 1 SA 98 (A) 113F 'In making separate awards, the court must of course guard against any overlapping and resulting duplication'; *Administrator-General SWA v Kriel* 1988 3 SA 275 (A) 289 'an appreciable... improper duplication of damages'; Cooper-Stephenson & Saunders 'Damages in Canada' 275-91; Luntz 'Damages' 2ed para 5.2.09.

[30]See 52.

[31]s8(1)of Act 30 of 1941. See too Koch 1987 *THRHR* 475-80; 1990 *De Rebus* 343-6.

[32]See, for instance, Koch 1987 *THRHR* 475-80; 1990 *De Rebus* 343-6 concerning the deduction of benefits paid in terms of the Workmen's Compensation Act 30 of 1941.

[33]Bloembergen '*Schadevergoeding*' 382-4; Van der Walt 'Sommeskadeleer' 217-20 236. Van Niekerk 1976 *Codicillus* 20-4 describes how an insurer can exercise a right of recourse against an employee of the insured. An employer has substantial control over employees. It seems undesirable that an employee of limited financial means should be deprived of insurance cover enjoyed by the employer.

employment are deducted when assessing the damages.[34] This ruling has been criticised[35] on the grounds that pension benefits are savings and hence that the *Dippenaar* case rules for the deduction from damages of savings accumulated prior to the injury. A prominent feature of all this criticism has been the absence of any detailed analysis of the damages calculation and the contingent nature of the pension benefits.[36] Table 12 below summarises the method of calculation used in the *Dippenaar* case.

We may note that for the uninjured condition the value of pension savings to date of injury (R87046) was added to the total value of salary earnings (R62250).[37] By reason of the injury the present value of pension benefits, including savings, was increased from R87046 to R111254, an increase of R24208 derived from risk insurance provided by the pension fund. The effect of the *Dippenaar* calculation was thus to treat savings as an in-out item, a matter of calculation convenience. The increase in value of R24208 one might appropriately describe as the 'accelerated value' of the expected pension benefits.[38]
An important feature of savings by way of pension benefits provided by an employer is that these only accrue to the employee if that employee satisfies certain conditions of service as laid down in the pension fund rules. One important condition is that the employee remain in service until retirement age. If the employee leaves service prior to retirement age then he will forfeit a greater or lesser part of the R87046 described above as 'savings'.[39] This 'savings' element reflects the value of the chance[40] of receiving a pension from normal retirement age. Some pension funds, but not all, provide special benefits on death or disablement. In *Dippenaar*'s case there was provision for a substantial disability pension on early ill-health retirement.

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[34]*Dippenaar v Shield Insurance* 1979 2 SA 904 (A). This has created inconsistency between the employed from whom a deduction is made, and the self-employed from whom no deduction is made. (Pauw 1979 *TSAR* 256 259). It has also placed the injured employee upon a different footing from the deceased employee (Assessment of Damages Act 9 of 1969). These anomalies attest that something is wrong, not that the *Dippenaar* case is incorrectly decided.

[35]Boberg 'Delict' 609-10; Pauw 1979 *TSAR* 256; Claasen & Oelofse 1979 *De Rebus* 588. Boberg motivates the non-deduction of pension benefits on the grounds that the action is specifically for loss of earning capacity as distinct from general financial loss. Boberg's reasoning is clearly unsound for, if applied consistently, it would mean that an injured person has no claim for medical and similar expenses. The practice of 'pigeonholing' is discussed under section 11.8.1. Conflict between *obiter dicta* in *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) and the *Dippenaar* ruling should, in terms of the rules of precedent, be decided in favour of *Dippenaar* which was handed down by an undivided court.

[36]Reinecke 1988 *De Jure* 221 227-9 discusses the problem having appropriate regard to the mixed insurance and savings nature of a pension fund. He is a notable exception.

[37]This follows the formula stated by the court in which all benefits which would have accrued were capitalized together (*Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 917E). This methodology is less confusing for complex situations than the more popular approach of differencing first and then capitalizing (see paragraph 12.2.1).

[38]Accelerated inheritance benefits are discussed at 333.

[39]This would not happen if pension funds were compelled to provide a transfer value of the member's interest to his new fund. An attempt in South Africa to introduce legislation to provide for compulsory transferability was aborted by the trade unions on the grounds that it deprived a worker of access to his savings.

[40]The value of R87046 discounts only the risk of early death. A further deduction should be applied for the risks of premature termination of service, and below-average salary increases.

TABLE 12 - IN-OUT PENSION SAVINGS

	Uninjured R	Injured R	Difference R
Earnings	62250	nil	62250
Pension benefits	87046	111254	(24208)
Totals	**149296**	**111254**	**38042**

Net loss = R149296 - R111254 = R38042

In *Oberholzer v Santam Insurance*[41] the court was presented with the net accelerated value, the capitalized difference (R2200) between the before and after pensions. The savings element had been eliminated in advance.

The *Dippenaar* methodology was followed in *Krugell v Shield Insurance*[42] where pension savings but for the injury were taken to be R76731 with the increased value after injury being R148770, an increase by reason of the injury of R72039.

[11.2.2] Exceptions to the 'Dippenaar' rule: The approach in *Dippenaar*'s case is appropriate for what are called 'defined benefit' pension funds. That is to say pension funds which provide a guaranteed level of pension at retirement **regardless of how little or how much money the particular member has contributed**. A number of funds do not guarantee final benefits, the pension payable being determined by whatever savings have been accumulated by the time that retirement occurs. For such funds it is usual to allow for future pension benefits by adding to the claimant's notional earnings the contribution that the employer would have made. This method has no regard for what has been accumulated in the past. If the claimant has received a lump-sum refund of contributions from the pension fund, that is savings to date of dismissal, it would be wrong to follow the *Dippenaar* ruling and deduct this lump sum when assessing compensation. If justice is to be achieved one must adapt one's rules for collateral benefits to the calculation methodology. This highlights the point that when dealing with collateral benefits an unquestioning application of precedent is to be deplored. It is essential that the relevant financial transactions be properly analyzed.

[11.2.3] Insurance as savings: Many forms of life insurance policy display the same features as pension benefits, there is an accrued savings component, the surrender value,[43] and a contingent element making up the balance of the sum assured. Thus a disability insurance

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[41] 1970 1 SA 337 (N) 341A-E.

[42] 1982 4 SA 95 (T) 106A-E.

[43] For retirement annuity policies this would be the transfer value.

might have paid out R100000 of which R8000 was the surrender value immediately prior to the injury and R92000 is the contingent cover provided because the injury has taken place. Had there been no injury the policy would have been worth only R8000. Accident benefits[44] and term insurances[45] do not give rise to surrender values[46] and thus involve no savings element at all.

Insurance benefits provided by an employer in terms of the 'contract of employment' are deductible in full.[47]

[11.2.4] Privately negotiated insurances: No deduction is made for pension and insurance benefits which the claimant had negotiated privately:

> 'If a person makes a decision to insure himself against loss by accidents he does so voluntarily, and his decision, and the fruits thereof, are completely divorced either from his employment, or from the liability of the wrongdoer. Moreover the amount he received from the policy bears, in the normal course, no relationship to the terms of his employment or the amount of his salary, the duration of his employment, or indeed to whether he is employed at all. His payment of premiums to secure a personal indemnity against injury, hardship, or loss are payments from what he has earned, and the fruits of those payments are no more the concern of the wrongdoer than would be the fruits of an investment in a building society or in the stock exchange. He would be entitled to payment of the benefits of the policy irrespective of the wrongdoer's negligence and irrespective of the terms of his employment'.[48]

A prominent view discernible here is that the court is not concerned with how a claimant would have spent his earnings. This follows from a view that the action for personal injury is an action for loss of earnings. The ambiguities and problems associated with this view are discussed more fully in the next chapter. Suffice it say for the moment that the courts are divided on the extent to which regard may be had as to how a man would have spent his earnings.[49]

[11.2.5] The insurance principle: When there is injury to a man who is covered under an accident policy is injured he receives payment under the policy far in excess of the premium paid. A large proportion of his benefit is derived from the premiums paid by numerous other policyholders who have not claimed under their policies. The costs of the insurance payment

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[44]Benefits payable according to a specified tariff, eg R20000 for loss of a leg, if the injury results from a violent accident.

[45]Life insurance policies for specified durations, such as 20 years, which do not provide a payment on expiry are pure insurance contracts without any savings element. These may include benefits payable in the event of injury in addition to the benefits payable on early death.

[46]Cash benefits payable on premature termination of an insurance plan.

[47]*Dippenaar v Shield Insurance* 1979 2 SA 904 (A)

[48]Cited with approval, but *obiter*, in *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 920-1. 'It is trite law that insurance benefits are not to be set off against a plaintiff's damages' *Mutual & Federal Insurance v Swanepoel* 1988 2 SA 1 (A) 8-9. See too Boberg 'Delict' 609-11; *Maroso v SA Eagle Insurance* 1987 3 C&B 638 (W) 642-3.

[49]See 225.

are directly met by the insurer from the pool of funds derived from premiums charged. The insurer fulfils the function of an administrative conduit between the population of policy holders and those who suffer loss by accident. When the time comes to pay damages an insurer, or perhaps a statutory body such as the MMF, will meet the cost from funds derived from the population at large by way of premiums or a petrol levy. In terms of this macro-economic view if the insurance benefits were to be ignored when assessing damages the population at large would be paying twice over,[50] and the claimant receiving double compensation.

Pauw[51] refers to the interests of the community that pensions should not be deducted. It is difficult to grasp his reasoning since an important desideratum of society is clearly that costs be contained. Boberg[52] maintains that we should be pleased to pay a small additional charge on the cost of a 'dinner for two'. That is fine for the claimant who has pension benefits which can be ignored, but what of the millions of persons without pension rights who also contribute through the petrol levy and other price mechanisms to the cost of meeting damages claims? The rules against deduction of insurance benefits tend to concentrate wealth in the hands of those who can afford the luxury of privately funded pension and insurance benefits.[53]

[11.2.6] Right of subrogation: An insurer who wishes to keep down premium costs may pay the insured, but subject to a right of subrogation.[54] A court would then be fully justified in making no deduction for the insurance payment. The claimant would be receiving the excess payment as a sort of trustee for his insurer and would thus not be receiving double compensation.[55] Alternatively the insurer would take over the claimant's right of action and recover the payment directly. The cost of the incident would be passed on to the public through the wrongdoer's insurer. Rights of recourse, such as subrogation are often administratively expensive to enforce relative to the amounts recovered and should in general be avoided.[56] Following the 'knock-for-knock' approach of the motor insurers[57] it is economically more efficient for each institution to recover its outlay through its normal

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[50]See 180.

[51]Pauw 1979 *TSAR* 256-7 ('gemeenskapsbelang').

[52]Boberg 'Delict' 599.

[53]As distinct from state social welfare benefits. Luntz 'Damages' 2ed 10-11 makes the point that non-deduction of insurances transfers wealth into the hands of the wealthy at the expense of the less fortunate who cannot afford insurance. The Assessment of Damages Act 9 of 1969 thus operates against the wealth redistribution ethic that prevails in South Africa.

[54]*Ackerman v Loubser* 1918 OPD 31 36. Article 47 of MMF agreement ito Act 93 of 1989 (s28 of the Compulsory Motor Vehicle Insurance Act 56 of 1972) provides for a right of recourse against unlicensed or drunken drivers.

[55]Van der Walt 1980 *THRHR* 1 23 'Die benadeelde kan in dergelike gevalle van sy versekeraar en van die dader ontvang totdat sy skade volledig vergoed is, en slegs vir wat hy meer as dit ontvang, is hy in 'n trusteeposisie teenoor sy versekeraar'.

[56]See footnote 33.

[57]An agreement not to recover from one another.

pricing or taxation or premium charges.[58] Life insurance contracts often include a substantial savings element and are never subject to subrogation.[59]

[11.2.7] Casual frolic: It can be argued that the spontaneous taking out of insurance does not form part of a life plan and for this reason benefits accruing from that source should be ignored. In one nineteenth-century case the claimant had[60] taken out temporary accident cover from a vending machine at a railway station before embarking on his fateful journey. The court ruled that the cause of the insurance payment was not the accident but the taking out of the insurance.[61] The claimant, it seems, did not take out the insurance cover as part of a general life plan to be insured. His taking of temporary accident cover was an 'off-the-cuff' action, a casual frolic outside the framework of his general life plan.[62] The court ruled that no deduction be made.

The taking out of extensive insurance as part of a life plan would indicate a person who was risk averse and thus likely to be a stable earner of income, one not inclined to take risks.[63]

[11.2.8] Durable and ephemeral 'investments': It has been noted above that when an insured person is injured the benefit paid is usually substantially in excess of the premium paid. The additional money comes from accumulated savings, that is to say the surrender value, and, more importantly, from other policyholders via the insurer for the contingent component. Analogously one may invest R500 in share market and after a price rise one may then sell for R1000. The profit comes from the fact that other persons are prepared to buy in at R1000 shares that originally cost R500. There is a superficial resemblance between the insurance transaction and the share market transaction. The major difference, however, is that the shares would have increased in value regardless of whether there had been an accident or not.

Without an accident a typical short-term insurance contract has no intrinsic value in exchange.[64] At the end of the insurance year the policy will expire leaving a valueless piece

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[58]An exception to this general principle is when the allocation of cost serves to reduce the incidence of accidents causing damage as in a factory environment (Atiyah 'Accidents Compensation & the Law' 3ed 587).

[59]Reinecke 1988 *De Jure* 221 232-3 speculates that the reason for non-deduction of life insurance money probably lies in the special nature of these contracts.

[60]*Bradburn v GWR* [1874-80] All ER 195 (Exch D).

[61]Causation does not provide a satisfactory solution to such problems (*Santam v Byleveldt* 1973 2 SA 146 (A) 151F). In *S v Mokgethi* 1990 1 SA 32 (A) the victim was rendered a paraplegic by the wrongdoer's bullet. The victim's subsequent death from infection was held to have been caused by the victim's subsequent failure to follow medical advice as to pressure sores (see Potgieter 1990 *THRHR* 267 for commentary). Similar reasoning in *Bradburn*'s case would have led to deduction of the insurance payment.

[62]Friedman & Savage 1948 *JPE* 279 286n16 'Special life insurance policies purchased to cover a single railroad or airplane trip are probably more nearly comparable to a lottery ticket than a means of achieving certainty'; McGregor 1965 *MLR* 629 636.

[63]See 151.

[64]The discussion here focuses on insurance contracts which never acquire a surrender value, ie which do not involve any savings element.

of paper.[65] The benefit gained from paying the premium was the utility of peace of mind of being covered.[66] In this sense insurance is a consumable like food and drink, not durable savings that increase patrimony. Insurance reduces the risk of a reduction to patrimony.[67] The payment of the premium purchases an entitlement to participate in a loss-sharing scheme. The same wrongful act that causes permanent loss from injury also renders durably valuable the otherwise ephemeral accident policy.[68] The purchase of share-market investments entitles one to share in a profit-and-loss scheme, the difference being that in the normal course of events this is an asset with a marketable value enhancing the value of patrimony, not something that vanishes with the expiry of the period of insurance.

If one examines the uses for life insurance listed by a top life insurance salesman,[69] one finds that pure life cover is not sold as an investment *per se*. Rather life insurance is sold as protection for investments in the sense of ensuring adequate cash liquidity in the event that the purchaser's life plan as regards investment and family support is prematurely terminated. Reinecke[70] records that the purchase of life insurance is directed at ensuring the completion of a life plan.

In terms of utility theory one would say that an insurance policy is a largely unmarketable commodity.[71] Typical of such insurance is 'term' life insurance, a form of life cover which provides no savings element, that is to say it never acquires a surrender value. As a general such life insurance has little or no utility for a third party. Any advantage is offset by the cost of the premiums that need to be paid. However, once the insured event has occurred, the utility, the value in exchange of the insurance policy, is vastly enhanced. The utility of bringing about the insured event can be so high that persons will take their own lives.[72]

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[65]*Parry v Cleaver* [1969] 1 All ER 555 (HL) 560B-C; see too *Smoker v London Fire & Civil Defence Authority* [1991] 2 All ER 449 (HL).

[66]Friedman & Savage 1948 *JPE* 279 285 'The empirical evidence for the willingness of persons of all income classes to buy insurance is extensive. Since insurance companies have costs of operation that are covered by their premium receipts, the purchaser is obviously paying a larger premium than the average compensation he can expect to receive for the losses against which he carries insurance. That is, he is paying something to escape risk'.

[67]ie reduces the general contingencies deductible if my life plan were to be valued. Due to the incidence of the insurer's expenses the cost of the insurance will usually be greater than or equal to the actuarial value of the risk which it serves to neutralize (Friedman & Savage 1948 *JPE* 279 285-6).

[68]People have been known to take drastic steps to bring about payment under a policy: eg *Beresford v Royal Insurance* [1938] 2 All ER 602 (HL) suicide; *S v Robinson* 1968 1 SA 666 (A) 675A 'The deceased wanted to be murdered so that the proceeds of his insurance policies would be paid out to his widow'.

[69]Feldman 'The Feldman Way' 131-99. This work discusses the selling of life insurance policies in the United States of America where legislation severely restricts the sale of life policies with a savings (investment) element.

[70]Reinecke 1976 *TSAR* 26 54 'Deur die afsluiting van lewensversekering in sy verskillende vorme maak 'n persoon juis seker dat sy toekomsprojeksies ten opsigte van sy vermoë, sy beoogde spaargeld of selfs verwagte inkomste, nie deur 'n te vroeë dood in die wiele gery word'.

[71]Apart from the surrender value.

[72]See, for instance *Beresford v Royal Insurance* [1938] 2 All ER 602 (HL) suicide; *S v Robinson* 1968 1 SA 666 (A) 675A 'The deceased wanted to be murdered so that the proceeds of his insurance policies would be paid out to his widow'. See too 256 below.

[11.2.9] Take your victim as you find him: In general a wrongdoer must take his victim as he finds him. If he is so unfortunate as to injure a person with the proverbial 'eggshell skull' then the damages will be substantial. If justice were even-handed then the injury of a well-insured victim would likewise require the payment of minimal damages.[73] Certainly the non-working millionaire can expect no compensation for loss of earnings[74] despite having paid for this condition with all his assets. The insured claimant, by way of contrast, has paid only a premium. It has been argued that the damages payable should not be influenced by so fickle an issue as the extent of the victim's insurances.[75] One may likewise argue that the damages should not be influenced by so variable a factor as the rate of pay which a victim receives.[76] The ultimate in such egalitarian arguments would be to pay the same money to all victims regardless of their financial circumstances.[77] This takes us back to the tariff systems of the Germanic *weergeld*.[78]

Foreseeability is commonly invoked by the courts as a test for whether a gain or loss should be ignored. It is usually foreseeable that the victim may be insured.[79]

[11.2.10] Premiums paid by the claimant: In deference to the perception that the claimant has paid for the insurance benefits with his own money,[80] justice would be done if the defendant reimbursed the claimant for the cost of the premium paid. But justice does not require that the claimant retain the benefit of premiums paid by numerous other policyholders.

[11.3] GRATUITOUS BENEFITS

[11.3.1] General: Benefits provided gratuitously to an injured person, or the family of a deceased breadwinner, will not be deducted when assessing the damages.[81] The justification for this rule is that the welldoer has personally borne part of the loss suffered and should for this reason be reimbursed, or at the very least be provided with the opportunity for

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[73]This reasoning was rejected in *Parry v Cleaver* [1969] 1 All ER 555 (HL) 575F.

[74]Bloembergen '*Schadevergoeding*' 105-6.

[75]'Surely it is nonsensical that the responsibility of a wrongdoer should be determined on the basis of whether he has hit an insured or an uninsured victim' 17.02.69 Hansard 841 846 (concerning the Assessment of Damages Act 9 of 1969).

[76]'While society might condone the difference in salary scales between an engineer and a clergyman (or value the products of the former more than the latter), it would not necessarily condone a larger award to the former after an accident when both have ceased to be productive in the same way as previously' Luntz 'Damages' 2ed 10.

[77]To ignore collateral benefits is to objectivize the damages and to deviate from the fully concretized loss: Bloembergen '*Schadevergoeding*' 360-8 378-84 389; Atiyah 'Accidents Compensation & the Law' 3ed 190-193; Luntz 'Damages' 2ed 349-51.

[78]See Davel 'Broodwinner' 62n193. A more colourful, perhaps less academic, description is to be found in Churchill 'History of the English-Speaking Peoples' vol 1 52.

[79]*Smit v Abrahams* 1992 3 SA 158 (C)

[80]Burchell 1978 *AS* 278-9; *Smoker v London Fire & Civil Defence Authority* [1991] 2 All ER 449 (HL).

[81]*Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A).

reimbursement.[82] Little or no value should be placed upon the prospect of future gratuitous benefits because they are likely to cease.[83] Another reason is that if the payments continue after the payment of compensation then it cannot be said that the payments have been caused by the injury or death.[84]

If it has been pre-arranged that the welldoer will be reimbursed when the award for damages has been made there is no problem in equity. But a problem arises when the claimant retains both the gratuitous benefit and the full damages. When this is done with the full knowledge and consent of the welldoer one is dealing with a donation subsequent to the award of damages. Such a donation is truly *res inter alios acta*.

[11.3.2] Directive by the court: In general, the waiver of a right will not readily be presumed by the courts.[85] With a right to reimbursement one would thus expect a requirement of clear evidence of intention to waive, that is the welldoer is demonstrably aware of his right to reimbursement and has expressly indicated agreement to waiver or has allowed prescription to run.[86] Boberg[87] argues that collateral benefits should be ignored because the persons who pay the collateral benefits do not have a right of action to recover the loss which they suffer by having to pay the benefits. His reasoning has merit if the damages are to be paid out of the pocket of the wrongdoer and there is a strong likelihood of reimbursement. But such wrongdoers are rare, if they exist at all. Claimants and welldoers generally have only a hazy understanding of the reasoning behind a court's award. The maxim *ubi ius ibi remedium* is not of unqualified universal validity.[88] It is thus highly desirable that a court which makes an award should at the same time give an express indication of the amounts which have been included by way of non-deduction to permit the reimbursement of welldoers. Many judgments include a list of the expert witnesses whose fees qualify for payment.[89] An analogous order concerning approved welldoers and the amounts involved would not be misplaced. In general doubt has been expressed as to the courts' capacity to make such an order.[90] If so then a suitable enabling provision should

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[82]*Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 153.

[83]*Browning v The War Office* [1962] 3 All ER 1089 (CA) 1092C.

[84]*Indrani v African Guarantee & Indemnity* 1968 4 SA 606 (D) 610A-D.

[85]*Mutual Life Insurance (New York) v Ingle* 1910 TS 540 550; *Botha v Finanscredit* 1989 3 SA 773 (A) 791-3.

[86]Prescription Act 68 of 1969. See Loubser 1990 *THRHR* 43-60: weak prescription (claim may be offset against future claims) is to be preferred to strong prescription (set-off not possible) under circumstances when many years may elapse before the welldoer in straitened circumstances himself may need to rely on the beneficence of the assisted victim.

[87]Boberg 'Delict' 492.

[88]An appeal to the maxim was unsuccessful in *Union Government v Ocean Accident & Guarantee Corp* 1956 1 SA 577 (A) 584G. *Ismael v General Accident Insurance* 1989 2 SA 468 (D), on the other hand, is an instance when the maxim was invoked to justify giving a right of action directly to a dependent child in lieu of the traditional group action of the child's father.

[89]See, for instance, *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1029-30.

[90]Bloembergen '*Schadevergoeding*' 347; Street 'Damages' 76; *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 151A. Canadian courts have adopted the procedure: Cooper-Stephenson & Saunders 'Damages in Canada' 487-8.

be introduced in South Africa by way of legislation.[91]

The recording of names in the judicial record may well enhance the willingness of many to assist needy victims. The procedure would protect the victim from excessive claims by avaricious welldoers. It would also ensure that if the victim does not reimburse the welldoer the resulting double compensation has reduced utility because it has been labelled by the court as due to a person other than the victim.

[11.3.3] A general rule?: In the *Byleveldt* case the court considered the viability of a general rule of reimbursement:[92]

> ''n Oplossing van die hele probleem sou wees om te vereis dat 'n benadeelde... soveel... terugbetaal as wat hy van die ander bron ontvang het, maar nie meer as wat hy van die delikpleger ontvang het nie'.

This general rule was rejected on the grounds that:

> 'Gesien die eiesoortige aard van die verskillende bronne waaruit vergoeding ontvang kan word... so 'n eenvoudige oplossing in die praktyk mees ingewikkelde probleme sou skep en in sekere gevalle strydig sou kan wees met wat in die belang van die gemeenskap beskou word'.

It is most unfortunate that the court did not detail the perceived complicated problems and interests of the community. This would have facilitated discussion and solutions.[93] There is little doubt that the general rule as stated would create problems. In the first place it fails to accommodate benefits for which deduction should be made without provision for reimbursement. In the second place it fails to consider the negative utility of an unenforceable court directive that orders certain amounts to be reimbursed on moral rather than legal grounds.[94]

[11.3.4] Inadequate compensation: By failing to highlight that there are welldoers to be compensated the court may fail to make an addition to the damages to permit onward payment to persons who provided benefits in kind. For instance a claimant's otherwise unemployed friend may have assisted with his nursing and thereby saved the expense of hiring a nurse. It would be proper that the award be increased to enable the claimant to give some expression of gratitude. The friend has suffered disutility by reason of the attendances. Bloembergen cites the example of the doctor who attends to his own wounds.[95] A fair

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[91] *General Accident Insurance v Summers* 1987 3 SA 577 (A) 616C 'Verder meen ek nie dat 'n onbevredigend bewoorde Hofreël genoegsame rede is om te beslis dat die skadevergoedingsberekeningsmetode wat deur appellante voorgestaan word, aanvaar moet word nie'.

[92] *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 153A-B.

[93] One suspects that the major difficulty perceived by *Rumpff JA* was the absence of a recognised legal procedure whereby a compensated victim could be ordered to reimburse welldoers (see *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 151A 151D 151H 153C-D).

[94] See 179.

[95] Bloembergen '*Schadevergoeding*' 108.

measure of the utility loss would be the cost that the defendant has been spared.[96] If a wife gave up her work and rendered such services in terms of her duty of support she has a right of action *eo nomine* to recover her financial loss.[97] The tendency of the South African courts to reimburse only proven cash disbursements[98] suggests that claims concerning a pure loss of utility may well prove unsuccessful.

[11.4] OVERLAPPING RIGHTS OF ACTION

[11.4.1] 'Group action' defined:The modern Roman-Dutch law in South Africa allows more than one person to claim for the same financial loss. In addition to the claim by the individual injured victim, or dependant of a deceased victim, one finds allowance for a claim by the head of the family *eo nomine* in what is best described as a 'trustee capacity' flowing from his relationship to the victim. Van der Walt describes the claimant of a benefit subject to subrogation as being a trustee for his insurer.[99] I use the expression 'group action' to describe this trusteeship on behalf of others who have suffered loss. The phenomenon is implicit to the to the non-deduction of collateral benefits with a view to enabling the victim to reimburse his welldoers. Perhaps the most common form of such a group action is the injured breadwinner whose action for personal injury precludes a concurrent action by his dependants for the loss of support they have suffered by reason of the loss of their breadwinner's earnings.[100] The concept of a group action is Germanic rather than Roman. For this reason the phenomenon exists uneasily, and poorly analyzed in a legal milieu, such as South Africa, which subscribes to a Civil-law tradition. I do not purport in this thesis to fully analyze 'group actions' and their interaction with separate individual rights of action. My purpose is merely to observe that such duplication of actions does exist and to provide examples thereof.

Dendy[101] has noted the mixed group/individual nature of the right that a dependant has to claim for loss of support. This extends through to actions by breadwinners who have been injured and suffered a reduction in life expectancy.[102] This ambiguous state of affairs would seem to be the result of a shift in emphasis over the years: in the nineteenth century the dominant view was that of a head of household, usually the father, who claims in his own name for the losses suffered by family members.[103] The modern law has tended to

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[96]See *Donnelly v Joyce* [1973] 3 All ER 475 (CA) 479-80 quoted in *Klaas v Union & SWA Insurance* 1981 4 SA 562 (A) 576-7.

[97]*Schnellen v Rondalia Assurance* 1969 1 SA 31 (W). In *Bennett v Sun Insurance* 1952 1 C&B 391 (E) 394 compensation was awarded to a wife who gave up her employment to nurse her husband. Had the wife been a full-time housewife without employment it is doubtful that her claim for compensation would have succeeded.

[98]See, for instance, the emphasis placed by the court in *Jones v Santam Insurance* 1976 2 C&B 602 (E) 605-6 on the question of who had paid what.

[99]See footnote 55.

[100]See *De Vaal v Messing* 1938 TPD 34.

[101]1990 SALJ 155. See too 1992 *THRHR* 480 and 283 below.

[102]See 227, 347.

[103]See, for instance, *Abbott v Bergman* 1922 AD 53 56 and its subsequent individualised interpretation in *Erdmann v Santam Insurance* 1985 3 SA 402 (C); *Oosthuizen v Stanley* 1938 AD 322 331 and the emphasis there on the claim by the father having regard to his duty of support to others, a thread that is taken up again in *De Vaal v Messing*

emphasise the individual,[104] assisted, if needs be, by the father or husband. Despite its historical association with an all-powerful *paterfamilias* in the Victorian mould, it would be wrong to describe this group action as an anachronism, it still has a useful role to play in achieving a just result in a complex legal environment.

[11.4.2] Single group action is preferable: When a wife or mother provides nursing or accommodation to an injured person this will generally be done in terms of a duty of support, in other words the benefit will not be gratuitous. Such a person has a right of action *eo nomine* to recover his loss.[105] It follows that the damage which he has personally suffered must be deducted from the claim of the injured person lest the defendant be called upon twice to pay the same damages. The creation of multiple rights of action does not simplify the compensation process.[106] The complexity gives rise to problems with prescription and pleading and the courts will, it seems, not be astute to enforce multiple actions: Thus in *Klingman v Lowell*[107] the mother of the victim provided him with free board and lodging, a benefit which the court refused to deduct on the grounds that it was 'gratuitous'. The court here seems to have overlooked the fact that the mother was obliged to provide the benefit in terms of her duty of support. In *Mhlawuli*'s case[108] the defendant consented to an approach along the lines of *Klingman v Lowell*. Bloembergen[109] prefers that there be separate rights of action for each individual. **There is much to be said, however, for a group action by the injured person who then receives monies in a trustee capacity for those associates who have suffered loss by reason of the injury.** This group action would ideally be supported by a judicial directive as to the allocation of the award to the various welldoers. Rules of procedure appropriate to commercial law[110] are not necessarily appropriate to the more personal and informal issues that arise with actions for damages for personal injury or death.

An individual right of recovery can arise by reason of *negotiorum gestio*.[111]

[11.4.3] Circumstances where separate actions preferable: It will happen that multiple claimants are unable to work together for one reason or another. This will typically arise when a deceased breadwinner had been divorced and remarried and has left two families. It is thus desirable, as noted by Dendy, that claimants have the option of bringing either a

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1938 TPD 34 to deny dependants a right of action for loss of support during the lifetime of the breadwinner.

[104]*Constantia Insurance v Hearne* 1986 3 SA 60 (A); *Schnellen v Rondalia Assurance* 1969 1 SA 31 (W); *Erdmann v Santam Insurance* 1985 3 SA 402 (C) 409.

[105]*Schnellen v Rondalia Assurance* 1969 1 SA 31 (W); *Erdmann v Santam Insurance* 1985 3 SA 402 (C) 409.

[106]See, for instance, paragraph 13.2.12.

[107]1913 WLD 186.

[108]*Mhlawuli v SA Mutual Fire & General Insurance* 1976 2 C&B 597 (E) 598mid-page.

[109]Bloembergen '*Schadevergoeding*' 292.

[110]In which a meticulous regard is had for rights of action, prescription, contract wording, limitation of damages to that which was foreseeable, etc.

[111]Assistance provided without the knowledge of the beneficiary and with the intention of obtaining reimbursement: *Standard Bank Financial Services v Taylam* 1979 2 SA 383 (C).

group action or separate individual actions. In order to avoid problems with *res iudicata* it is essential that judgment in respect of a group action indicate clearly the separate interests in the damages award of the separate parties.

Motor-vehicle-accident claims are subject to limitation in certain circumstances.[112] This limitation is not applied to the overall group action but to the separate claim of each dependant.[113]

[11.4.4] Collateral support after death: When a breadwinner is killed, only the dependants have a right of action, but only for what they have lost by way of support. This does not account for persons who have supported the dependants prior to the payment of compensation. Such persons do not have a right of action for their damages occasioned by providing support. Because they are compelled to act in terms of a duty of support they are not free to stipulate for reimbursement. The South African solution to this problem has been to rule such alternative sources of support as non-deductible.[114] This transfers the loss to the defendant and makes it feasible for the claimants to reimburse the duty-bound welldoers.[115]

[11.4.5] Expenses of an injured child: The future medical and related costs for an injured child have traditionally been awarded to the parent of the child *eo nomine*. The child himself, however, has a right of action for such expenses.[116]

[11.5] THE 'CONTRACT' OF EMPLOYMENT

[11.5.1] Employers as loss bearers: Wages paid gratuitously and out of proportion to the services rendered are not to be taken into account when assessing damages.[117] In general employers are expected to meet from their own resources a greater or lesser part of the loss occasioned by an injury. They have no right of action for the damage or inconvenience which they suffer.[118] Munkman maintains that an employer should not be a bearer of loss.[119] Atiyah, on the other hand, perceives employers and insurers as comparable

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[112]Article 46 of MMF agreement ito Act 93 of 1989.

[113]*Constantia Insurance v Hearne* 1986 3 SA 60 (A).

[114]*Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D. The principle is sound but misplaced in the context of *Groenewald v Snyders* where the defendant only sought to off-set support derived from surplus life insurance money. Later in the same judgment the court, somewhat inconsistently, went on to say that life insurance is generally intended for the provision of ongoing support after the breadwinner's death (248A). In *Pitt v Economic Insurance* 1957 3 SA 284 (D) 286G-inf Holmes J held that one should look at 'substance more than form', a directive that he did not follow in *Groenewald v Snyders*.

[115]The dependants' action retains vestiges of its origin as a Germanic group action (see *Oosthuizen v Stanley* 1938 AD 322 331).

[116]See section 12.14.

[117]*Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A).

[118]*Union Government v Ocean Accident & Guarantee Corp* 1956 1 SA 577 (A).

[119]Munkman 'Damages' 4ed 67n(p).

channels for loss distribution to the community at large.[120] It is of note that an employer is vicariously liable for the wrongful acts of his employee.[121] There seems to be no major objection to expecting an employer of financial substance to meet part of the cost of compensating an injured employee. Munkman's view has validity for the smaller employer of limited financial resources and loss-distribution powers. This consideration is given some, albeit inadequate, recognition by the employer's right of action for injury to a 'diensknecht', a private or household servant.[122] The lesser ability of a small employer to pay would also be relevant to the deductibility or otherwise of gratuitous employment benefits.[123] Large institutions will generally have met the problem before and act in accordance with policy or practice.[124] Many small employers may never have encountered the problems of coping with the death or injury of an employee and may well, out of ignorance, act contrary to the best interests of themselves and the claimant. Judicial intervention and guidance is then highly desirable.[125]

[11.5.2] Employment benefits: The employer's liability may be limited to the statutory period of sick pay alone.[126] Other employers may provide a substantial pension, a lump sum accident insurance benefit, and continuing membership of the medical aid fund. When an employer goes beyond the normal contractual framework in order to assist an injured employee there is good reason to facilitate reimbursement. After injury many employers continue to pay salary subject to a stipulation for reimbursement in the event of a successful damages claim. In theory such stipulations are readily brought into account. In practice difficulties arise: The repayable salary payments will normally be compensated net of taxation whereas the employer will seek to recover the cost to himself before deduction of taxation. If care is not taken this can turn out to be more than the claimant has been awarded by way of damages. The solution to this problem is to treat all salary payments as deductible and then to add back to the damages the specific amount that the employer seeks to recover. Most employers provide a certificate in this regard. A similar problem arises when there has been an apportionment of the damages but in this instance the claimant has been the author of part of his own loss and it seems correct that the defendant should not be liable for more than a pro-rata proportion of what the employer seeks to recover.

Apart from the difficulties with quantum just listed there are other problems: The claimant's legal representatives will not always be aware of the contractual arrangement to reimburse the employer. Disputes arise with 'gratuitous' salary payments which are not subject to a

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[120]Atiyah 'Accidents Compensation & the Law' 3ed 245.

[121]See, for instance, *Gibbins v Williams Muller Wright & Mostert* 1987 2 SA 82 (T) 82 90.

[122]*Union Government v Ocean Accident & Guarantee Corp* 1956 1 SA 577 (A) 586.

[123]Such as were the subject of *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A).

[124]Levy 'Rights at work' 101 'When a practice becomes established, clear and recognized and has continued for a long time it becomes part of the contract of employment'. See too Levy 20.

[125]See paragraph 11.3.2.

[126]s13 Basic Conditions of Employment Act 3 of 1983.

stipulation for reimbursement. It is not always easy to ascertain just what is gratuitous.[127] Poor understanding by employers and claimant as to the composition of the award will usually have the consequence that a claimant will often retain his double compensation without the knowledge and consent of the employer. This latter problem is best dealt with, as already discussed,[128] by an express stipulation in the judgment that the value of the gratuitous wages should at least be offered to the employer.[129] The problem of just what constitutes a 'gratuitous benefit' becomes entangled with the interpretation of the contract of employment, an issue which also influences the deductibility of insurance and pension benefits.[130]

[11.5.3] Reasonable expectations: The relationship of an employee with his employer is generally defined by a formal contract of employment, what one might conveniently term the contract *stricti iuris*,[131] and an informal understanding based on the reasonable expectations of the employee, the contract in equity.[132] The Basic Conditions of Employment Act[133] ensures that all employees to which it applies are subject to certain minimum entitlements of leave, sick pay and notice. The Transvaal courts have taken the view that if the provision of an employment benefit was likely then it is contractual.[134] This is substantially, although not entirely, what I have designated above to be a contract in equity. Cape courts have generally taken an approach *stricti iuris* to the problem.[135] The approach of the Transvaal courts is to be preferred, not the least because the calculation of future loss of earnings will include allowance for future discretionary benefits such as promotions and increases to offset the effects of inflation. An approach *stricti iuris* to 'discretionary benefits' would render such prospects *res inter alios acta* and outside the purview of the court.[136]

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[127]This issue divided the court in *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A). Levy 'Rights at work' 37 'Many of the additional benefits that management provide are regarded by them as being discretionary - that is, they may award them or withdraw them as they wish, but in fact this is not always the position'.

[128]See paragraph 11.3.2.

[129]If prior to the trial the employer has expressly indicated that reimbursement is not required (eg *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 170E) then it is appropriate to make a deduction.

[130]*Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 920.

[131]In the genitive because it qualifies the noun 'contract'. Levy 'Rights at work' 22 details a number of sources which determine the terms of a contract of employment.

[132]*Mokoena v Administrator Transvaal* 1988 4 SA 912 (W); *Ludick v Samca Tiles* 1993 2 SA 197 (B) (legitimate expectations of employees).

[133]3 of 1983 (ss12 13 14).

[134]*Serumela v SA Eagle Insurance* 1981 1 SA 391 (T); *Krugell v Shield Insurance* 1982 4 SA 95 (T) 102-4. Gough 1983 *THRHR* 474 prefers this approach.

[135]*Gehring v UNSBIC* 1983 2 SA 266 (C) 273G. The decision was made without knowledge or consideration of the Transvaal decisions. The *Gehring* decision was concerned with future employment benefits. See too *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) A3-47-8 for a similar finding on past loss in respect of benefits paid in terms of the employer's policy. In *Maroso v SA Eagle Insurance* 1987 3 C&B 638 (W) 642-3 the court refused to deduct accident benefits provided in terms of the contract of employment because it was presumed that the claimant had the option to refuse to take such benefits.

[136]This would be contrary to the ruling in *Southern Insurance v Bailey* 1984 1 SA 98 (A) 115-16 that explicit allowance may be made for future inflation.

[11.5.4] Sick pay and leave pay: The deduction or non-deduction of sick pay also requires careful attention. In general sick pay is properly deductible apart from some small allowance for the contingency that it may be needed in the future for some other illness.[137] Where the sick pay has been extended in terms of normal company practice it remains deductible although not claimable as of a right.[138] When sick leave is exhausted many claimant's utilise their annual or accumulated long service leave. Such leave pay, although claimable as of a right, should not be deducted. Annual leave is in the nature of savings in that if the employee leaves service the employer must pay out the commuted value of such leave.

Gehring's case[139] ruled that no deduction should be made for future sick pay available at the discretion of the employer. This ruling is clearly unsound in that it is not judicial policy to ignore the value of a chance when assessing damages.[140] A general application of a test of 'discretionary benefits' would require that no allowance be made for future increases in salary for inflation or promotion, nor for bonuses. The proper approach to uncertain benefits is to allow the value of the chance of those benefits. The *Gehring* decision is the result of a poorly considered *obiter dictum* in *Dippenaar v Shield Insurance*.[141]

[11.5.5] 'Gratuitous' benefits: The implications of an equitable approach to the contract of employment is that if salary or wages continue to be paid on a discretionary basis, but in accordance with normal practice, then the benefit is taken to be paid contractually and is deductible. It should be borne in mind that many employers adopt a discretionary approach to sick pay in order to weed out malingerers but with the intention to pay in the majority of cases. The adoption of a generous approach to injured employees is not always as gratuitous as might appear at first sight. Where the employer acts with an ulterior motive it is doubtful that the salary payments are gratuitous in the strict sense of the word.[142] An employer who projects a caring image has much to gain from a stable and contented workforce.[143]

[11.5.6] Contractual discretion: Consistent with the principle discussed above it has been held that the exercise of a discretion within a contractual framework is a benefit in terms of the contract of employment:

> 'The fact that the employer in the present instance has a discretion does not mean that he does not have a contractual obligation towards the appellant. The rules of the pension fund are contractual terms to which the employer and the employee are bound. The discretion which the employer has in terms of those rules, therefore is

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[137]The value of this contingency was actuarially calculated in *Bosch v Parity Insurance* 1964 2 SA 449 (W) 452D/E.

[138]*Serumela v SA Eagle Insurance* 1981 1 SA 391 (T) 392-3.

[139]*Gehring v UNSBIC* 1983 2 SA 266 (C) 273G.

[140]See 71.

[141]1979 2 SA 904 (A) 921D.

[142]See, for instance, *Van Blerck v Van Blerck* 1972 2 SA 799 (C) and the minority judgment of *Trollip JA* in *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 169-73).

[143]Van der Walt 1980 *THRHR* 1 10 ''n Werkgewer mag goeie bedryfspolitieke redes vir 'n dergelike voortgesette besoldiging hê'.

> not unfettered. He is contractually bound to exercise it in terms of the contract. He must furthermore exercise it properly, reasonably and in accordance with the rules of natural justice and fairness. If therefore the employer, exercising a proper discretion, will probably have to allow the appellant to retire on early pension, such pension must be taken into account'.[144]

[11.6] BENEFITS PAYABLE BY THE STATE

As a general rule benefits paid or provided by the State and related bodies are deducted when assessing compensation, for example: Reduced liability for taxation;[145] accommodation free of charge in a State institution;[146] hospital expenses;[147] and welfare grants.[148] This is in accordance with the macro-economic principle that the financial burden on the population at large should be minimized. It is also undesirable that government bodies should waste public funds by seeking to enforce rights of recovery between various departments.[149] It is highly unlikely that a compensated victim would feel morally bound to reimburse the State for benefits provided. In general, however, Parliament has displayed little concern that public funds may be wasted through double compensation.[150] It is clearly tempting for forensic opportunists to argue that State benefits are discretionary, gratuitous, in the nature of public charity, and should therefore be ignored.[151] Central to such an argument would be the issue of grants to needy dependants and disabled persons without income:

Such grants are subject to a means test and will usually terminate when compensation is paid. The award of such a grant is subject to an administrative discretion[152] exercised within the framework of laid down criteria.[153] Once such criteria are met the claimant has a right to

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[144] *Poo v President Insurance Co Ltd* 1992 4 C&B A3-96 (T) A3-102.

[145] *Pitt v Economic Insurance* 1957 3 SA 284 (D) 287sup-C; *Dorfling v Bazeley* 1961 1 C&B 128 (E) 132inf; *Oberholzer v Santam Insurance* 1970 1 SA 337 (N) 342E.

[146] *Roberts v Northern Assurance* 1964 4 SA 531 (D) 537G-H; *Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1086A-G.

[147] *Barnard v Union & SWA Insurance* 1971 1 SA 537 (EC) 538G; *Williams v Oosthuizen* 1981 4 SA 182 (C) 185.

[148] *Indrani v African Guarantee & Indemnity Co* 1968 4 SA 606 (D) 609G 610A-D.

[149] Bloembergen '*Schadevergoeding*' 382; Van der Walt 'Sommeskadeleer' 217-20 236.

[150] See discussion of Assessment of Damages Act 9 of 1969 reported 17.02.69 Hansard 841 844-6. Also note in particular the comments concerning the non-deduction of benefits under the Workmen's Compensation Act 30 of 1941.

[151] Such opportunism has been rewarded in England. McGregor 'Damages' 14ed 828 caustically observes that the English courts when faced with the issue have 'predictably' ruled that State welfare benefits are gratuitous and thus non-deductible. With the ruling in *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) South African law moved away from the English approach as recorded in *Parry v Cleaver* [1969] 1 All ER 555 (HL).

[152] See footnote 144 and quotation.

[153] Disability Grants Act 27 of 1968 (coloureds only) s3 lays down conditions for 'Persons qualifying for disability grants'. Social Aid Act 37 of 1989 (whites only) s5 lays down conditions for 'Persons entitled to social grants'. Social Pensions Act 37 of 1973 (persons other than whites and coloureds) s3 lays down conditions for 'Persons entitled to social pensions'. The word 'qualifying for' in s3 of Act 27 of 1968 is used in the sense of 'entitled to' (s7 of same Act uses words 'entitled' and 'pension due', s10 uses the word 'entitled'). Children's Act 33 of 1960 s90 refers to benefits (in terms of s89) to which beneficiary 'was not entitled'; Child Care Act 74 of 1983 refers to benefits in terms of s56 to which beneficiary 'was not entitled'.

such pension[154] and may, it seems, compel payment thereof by legal process. These considerations suggest that disability and dependency grants should be deducted from past loss of earnings or support, but not from future loss. However, if the court has reason to believe that the claimant will rapidly squander the damages award then there may be some justification for making a deduction from future loss for the chance that the grant may revive in years to come.

A pension will not be awarded to a claimant who does not make application. A claimant who has failed to apply for such a pension during the pre-trial period has, strictly speaking, failed to properly mitigate his damages and should, it may be argued, be compensated as though he has had the benefit of such a grant. In practice grants are sometimes not paid due to inadequate administrative procedures.

[11.7] PUBLIC SUBSCRIPTIONS

It does happen that benefits are provided to accident victims by way of public subscription. The contributing persons may be so widespread and numerous that reimbursement is not a practical proposition.[155] But is it morally desirable that the claimant should retain double compensation? There will usually be no privity between the welldoers and the victim, except if the welldoer is an employer or family member. It would thus be unreasonable to presume that the benefits were provided with a view to subsequent double compensation. The court then has the choice of deducting the benefit as a form of insurance payment or declining to deduct subject to a direction to the claimant to pay the funds to a suitable welfare organization.

[11.8] PIGEONHOLING

[11.8.1] Pigeonholing: Associated with the focus upon a damaged object[156] is the phenomenon of 'pigeonholing'. Orderly systematic thought demands that losses are classified according to rules and procedures governing the different types of loss. Past earnings, future earnings, future loss of support, past and future medical expenditure, etc. The phenomenon of 'pigeonholing' arises when thought becomes locked into the classification as a closed microcosm. Typical examples of 'pigeonholing' are:

> ***[11.8.1.1] Past gains***: Consider an injured victim who loses past and future earnings of R600000 but who, in terms of his contract of employment, is granted a lump sum and a pension worth R700000. In so far as earning capacity is concerned there is a net gain R100000. May this be offset against future medical costs? A universalist would say yes. A 'pigeonholer' would say no.
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> ***[11.8.1.2] Loss of support by reason of personal injury***: The appellate division has

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[154]All legislation providing for disability pensions and welfare grants (see previous footnote) is characterized by a ministerial discretion, usually in consultation with another minister, as to availability of funds. This discretion is concerned with needy persons as a group, not individuals. Once the ministerial discretion has been exercised then those qualifying in terms of the laid down conditions become entitled to benefits.

[155]Luntz 'Damages' 2ed 384.

[156]See paragraph 3.3.8.

awarded to an injured young woman compensation for loss of the financial benefits of marriage, loss of support from a notional future husband who due to the injury she will never have.[157] Popular juristic perceptions dictate that compensation for injury is for loss of earnings. Loss of support claims are perceived as being restricted to the death of a breadwinner. This 'pigeonhole' outlook has given rise to at least one theoretical attempt to rationalize the 'loss of financial benefits of marriage' within a 'loss-of-earnings' pigeonhole.[158]

[11.8.1.3] Support in old age: A young working woman married to a very much older man will have a substantial prospect of supporting him for 10 to 20 years after he retires, particularly if he has poor pension prospects. Until he retires he is the main breadwinner. Can support lost by the widow during the deceased's pre-retirement years be offset against the support which would have been provided to the deceased after his retirement? A 'pigeonholer' would say no and terminate the calculation at the time of the deceased's notional retirement. A universalist would offset the widow's long-term gain against her short-term loss.

[11.8.1.4] Like deducted from like: One finds it said that only like should be deducted from like.[159] The inequity which this application of 'pigeonholing' sought to address was the claimant who had failed to claim for medical expenses which had been paid by the workmen's compensation commissioner.[160] The recovery sought by the commissioner included the amounts paid by way of medical expenses. 'Pigeonholing' ensured that the commissioner's medical disbursements would only be deducted from the claimant's damages to the extent that such damages included an award for medical expenses. In this circumstance 'pigeonholing' achieved an equitable result.

The like-from-like criterion is not a general principle of assessment and if used as such does not always produce justice. Thus, for example, the reduced earnings after an injury have been viewed, not as a deductible compensating advantage, but as the residue of an asset that was previously worth more. In English law such a pigeonholing approach has led to a ruling that a disability pension should not be deducted from the earnings which it replaces.[161]

[11.8.2] Overlapping heads: From a utilitarian point of view the different heads of damage interact and overlap. To arrive at the true net financial effect of the wrongful act, gains from

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[157] *Commercial Union Assurance v Stanley* 1973 1 SA 699 (A).

[158] Boberg 'Delict' 576-7.

[159] *Klaas v Union & SWA Insurance* 1981 4 SA 562 (A) 581B 591-2; *Senator Versekeringsmpy v Bezuidenhout* 1987 2 SA 361 (A). For commentary see Koch 1987 *THRHR* 475-480.

[160] *Klaas v Union & SWA Insurance* 1981 4 SA 562 (A) 581B 591-2.

[161] *Parry v Cleaver* [1969] 1 All ER 555 (HL) 564A2 582E-G. South African law is different. In *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) it was held that a disability pension should be deducted. For discussion of this latter judgment see 183 below.

one 'pigeonhole' need to be offset against losses from other 'pigeonholes'.[162] The arithmetical sum of the individual heads will usually exceed the true value of the whole loss. The most obvious manifestation of this aspect of the assessment of damages is the deduction made for general contingencies. The courts have cautioned against overlapping heads.[163] The effect of bringing together different heads of gains and losses is to treat the claimant's overall patrimonium, his rights and duties, his past and future prospects good and bad, as a unit, a single asset which is reduced in value by the wrongful act.

Thus, for example, in *Kriel*'s case [164] the trial court held that the assessment of general damages is separate and distinct from what is awarded under patrimonial loss. This approach was subsequently rejected by the appellate division which found 'an appreciable... improper duplication of damages'.[165] This latter finding was motivated by the extensive range of devices for which allowance had been made in the award for future expenses. What can be done with the award for general damages is not the sole factor governing its assessment.[166] Van der Walt and Bloembergen are both in agreement that pigeonholing is undesirable.[167] More generally it has been said that:

> 'In making separate awards, the Court must of course guard against any overlapping and a resulting duplication'.[168]
>
> ''n Beoordelaar hom by die vasstelling van die eiser se skade aan die konkrete omstandighede moet oriënteer, en nie aan 'n min of meer onbuigbare skematiese onderskeid tussen verskillende skadesoorte nie'.[169]
>
> 'One must be careful not to elevate what may be no more than a convenient classification into a source of legal rules'.[170]
>
> 'I fear... the rigidity which such classification and labelling may induce. I appreciate the value, in its proper sphere, of a scientific analysis and sub-division under proper nomenclature of the applications in practice of a legal principle. I think, however, it is possible that... an undue limitation may be placed upon its scope by an attempt

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[162] *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 920G (the 'contract of employment' criterion here created is effectively a large pigeonhole).

[163] *Southern Insurance v Bailey* 1984 1 SA 98 (A) 113F.

[164] *Kriel v Administrator-General SWA* 1986 3 C&B 539 (SWA) 548mid-page.

[165] *Administrator-General, SWA v Kriel* 1988 3 SA 275 (A) 289E.

[166] *Southern Insurance v Bailey* 1984 1 SA 98 (A) 117-20; *Gerke v Parity Insurance* 1966 3 SA 484 (W). See paragraph 12.15.6.

[167] Van der Walt 'Sommeskadeleer' 204-5; Bloembergen '*Schadevergoeding*' 117-22.

[168] *Southern Insurance v Bailey* 1984 1 SA 98 (A) 113F. See too Cooper-Stephenson & Saunders 'Damages in Canada' 275-91; Luntz 'Damages' 2ed para 5.2.09.

[169] Van der Walt 'Sommeskadeleer' 205n27. This passage read together with 425-48 would suggest that Van der Walt would separate damages for patrimonial and non-patrimonial loss but would nonetheless allow a gain under one head to be offset against a loss under another head. See too 110 204-5 and 1980 *THRHR* 1 16 25.

[170] *Pretoria North Town Council v A1 Electric Ice Cream Factory* 1953 3 SA 1 (A) 11B3.

to define its applicability entirely by means of type or class tests'.[171]

The latter two quotes are concerned with the exercise of an administrative decision. The assessment of damages involves the exercise of a wide judicial discretion. These statements of principle would thus seem to be relevant.

[11.8.3] 'Pigeonholing' general damages: In *Bezuidenhout*'s case[172] the claimant had suffered no loss by way of earnings but had nonetheless been awarded a pension by the workmen's compensation commissioner. Defendant sought to deduct the value of this pension from the claimant's award for general damages for pain and suffering and loss of the amenities of life. Defendant's approach was rejected on the grounds that benefits under the Workmen's Compensation Act are patrimonial.[173] The court also pointed out that, for the same reason, the commissioner could not recover from the defendant.[174] The fairness of this decision is not all that obvious. Even after deduction the victim would have retained financial benefits with a value at least equal to the common-law damages. The rule against double compensation suggests that the value of the pension should have been offset against the award for general damages. From the claimant's point of view the utility of money, its buying power, is exactly the same regardless of whether the lawyers have labelled it 'general damages' or 'patrimonial damages'. From the lawyer's point of view there is no clear dividing line between general damages and patrimonial loss.[175] Thus it is common that when no explicit award has been made for loss of earnings, the award for general damages has been increased to allow for the value of the chance of loss of earnings.[176] An award of general damages will also be increased to allow for the prospect of uncertain future expenditure.[177]

[11.8.4] Effect of supervening death: The action for general damages, that is for pain and suffering and loss of the amenities of life, is not Aquilian.[178] The substantive law nonetheless awards as compensation a single undivided lump sum incorporating both patrimonial and non-patrimonial elements.[179] The claim for general damages is not

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[171] *SA Defence & Aid Fund v Minister of Justice* 1967 1 SA 263 (A) 278C-D.

[172] *Senator Versekeringsmpy v Bezuidenhout* 1987 2 SA 361 (A).

[173] *Senator Versekeringsmpy v Bezuidenhout* 1987 2 SA 361 (A) 368.

[174] *Senator Versekeringsmpy v Bezuidenhout* 1987 2 SA 361 (A) 368E.

[175] *Dlamini v Government of RSA* 1985 3 C&B 554 (W) 587 '... there must be some interaction between awards for patrimonial loss on the one hand and the award for non-patrimonial loss on the other... I cannot ignore... what is a different head of damage but forms part of one and the same award'.

[176] *Mashini v Senator Insurance* 1979 3 C&B 82 (W); *Assur v Protea Assurance* 1981 3 C&B 196 (C); *Dyssel v Shield Insurance* 1982 3 SA 1084 (C); *Southern Insurance v Bailey* 1984 1 SA 98 (A) 112-13 'A Court is entitled... to award a globular amount in respect of general damages including loss of earning capacity'.

[177] See, for instance, *Celliers v SAR&H* 1961 1 C&B 160 (T) 165; *Mashao v President Insurance* 1993 (T) (unreported 1.6.93 case 8370/92).

[178] *Government of RSA v Ngubane* 1972 2 SA 601 (A) 606-7.

[179] *Casely v Minister of Defence* 1973 1 SA 630 (A) 642D-E. Van der Walt 'Sommeskadeleer' 425-48 would rather that a clear division was made between general damages and patrimonial loss.

transmissible to the estate of the claimant should he die before *litis contestatio*.[180] Should he die after *litis contestatio* the claim for general damages becomes an asset in the deceased's estate.[181] One would expect that the basis upon which general damages are assessed for a dead victim is much the same as for an unconscious victim.[182] The ability of the claimant to benefit from the award is not the sole criterion governing assessment.[183] These considerations all suggest that general damages has a patrimonial quality in the sense of permanence and transmissibility to one's heirs.

With loss of earnings the claim for past loss will persist even if the victim dies before *litis contestatio*. The claim for future loss of earnings falls away.[184] The rule that no compensation is awarded for earnings foregone during the 'lost years' derives from the observation that after a claimant's death there is no more need for the living expenses which would have been met from earnings.[185] This ephemeral aspect of the claim for loss of earnings points to a non-patrimonial quality for this category of loss.

[11.8.5] Overlap between patrimonial and non-patrimonial: General damages are awarded for loss of utility of bodily function. Patrimonial loss is awarded for goods and services which can be directly valued in monetary terms. The difference between patrimonial and general damages becomes distinctly blurred when one considers that part of earnings which would have been expended on activities promoting physical or psychological well-being, such as travel, eating, drinking, entertainment and medical care. An award of general damages may include allowance for loss of earning capacity[186] and future *damnum emergens*.[187] The availability of comprehensive case reports of past awards for general damages[188] has the consequence that placing a monetary value on pain and suffering and loss of the amenities of life is often easier than assessing the value of lost future earnings or expected future medical costs.[189] Comparable awards are adjusted for inflation to present value[190] subject

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[180]*Government of RSA v Ngubane* 1972 2 SA 601 (A) 606-8; *Santam Versekeringsmpy v Roux* 1978 2 SA 856 (A) 866.

[181]*Potgieter v Rondalia Assurance* 1970 1 SA 705 (N); *Potgieter v Sustein (Edms) Bpk* 1990 2 SA 15 (T).

[182]*Gerke v Parity Insurance* 1966 3 SA 484 (W); *Reynecke v Mutual & Federal Insurance* 1991 3 SA 412 (W). More generally see Boberg 'Delict' 567-70.

[183]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 119-20; *Gerke v Parity Insurance* 1966 3 SA 484 (W).

[184]*Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A).

[185]*Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 306A.

[186]See footnote 178 at 63.

[187]See footnote 179 at 63.

[188]The creation of the courts by precedent of a pricing system for general damages casts this head of damages increasingly into a patrimonial mould (Visser 1988 *THRHR* 468 484). Boberg 'Delict' 573 observes that 'Awards are not made in a vacuum'.

[189]'... die reg wel 'n tipe markwaarde aan bepaalde nadeel kan toevoeg' Visser 1986 *De Jure* 207 213.

[190]*SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 841E-F.

to a large discretion to award what is considered right.[191] The prevailing practice in South Africa is fairly accurately described by the following statement of English practice:

> 'As regards assessment of damages for non-economic loss in personal injury cases, the Court of Appeal creates the guidelines as to the appropriate conventional figure by increasing or reducing awards of damages made by judges in individual cases for various common kinds of injuries. Thus so-called "brackets" are established, broad enough to make allowance for circumstances which make the deprivation suffered by an individual plaintiff in consequence of the particular kind of injury greater or less than in the general run of cases, yet clear enough to reduce the unpredictability of what is likely to be the most important factor in arriving at settlement of claims. "Brackets" may call for alteration not only to take account of inflation, **for which they ought automatically to be raised**, but also it may be to take account of advances in medical science which may make particular kinds of injuries less disabling or advances in medical knowledge which disclose hitherto unsuspected long term effects of some kinds of injuries or industrial diseases'.[192]

The claim for general damages cannot be ceded prior to *litis contestatio*. The practical effect of this restriction is that neither of the claims for general damages nor patrimonial loss can be ceded.[193] This is so because the dividing line between the two classes of damages is by no means clear. A further reason is the interaction between the two classes of damages as in *Kriel*'s case[194] where the award for general damages was reduced by reason of the extensive equipment allowed for under patrimonial loss. A separation of general damages from patrimonial damages by way of cession would render embarrassing, if not impossible, the task of the court if these claims had then to be assessed at different times in different actions. In *Roux*'s case[195] the notional separation of the claim for general damages from the claim for patrimonial damages was feasible within the intimate confines of marriage, although not without risks of judicial embarrassment at having to assess general damages without details of what has, or will, be awarded by way of patrimonial loss.

[11.8.6] Statutory 'pigeonholing' of general damages: Notwithstanding the difficulties inherent to a separation of general damages from patrimonial loss, such separation has been given statutory recognition.[196] It has also been suggested that to reduce the cost to the

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[191] *Capital Insurance v Richter* 1963 4 SA 901 (A) 906-7 (the Corbett & Buchanan series was then, it seems, not available); *Marine & Trade Insurance v Goliath* 1968 4 SA 329 (A) 334; *Protea Assurance v Lamb* 1971 1 SA 530 (A) 535-6 'Such assistance as could be derived from the general pattern of previous awards, and allowing for the decrease in the value of money... the process (should not) be allowed so to dominate the inquiry as to become a fetter upon the Court's general discretion'. In *AA Onderlinge Assuransie v Sodoms* 1980 3 SA 134 (A) 140-2 the remarks concerning the adjustment for inflation are directed at an error in the trial judge's arithmetic and do not mean that no adjustment should be made for inflation.

[192] *Wright v British Railways Board* [1983] 2 All ER 698 (HL) 706a-b (emphasis supplied) referred to with approval in *SA Eagle v Hartley* 1990 4 SA 833 (A) 841. See too *Protea Assurance v Lamb* 1971 1 SA 530 (A) 534-6.

[193] *Government of RSA v Ngubane* 1972 2 SA 601 (A). More generally see Boberg 'Delict' 485 530.

[194] *Kriel v Administrator-General, SWA* 1986 3 C&B 539 (SWA) 548mid-page.

[195] *Santam Versekeringsmpy v Roux* 1978 2 SA 856 (A) 867-8.

[196] Matrimonial Property Act 88 of 1984 s17(1)(b); article 47(a) of MMF agreement ito Act 93 of 1989.

public of damages for personal injury compensation should be restricted to patrimonial loss.[197] Certainly the development of a guideline which clearly separates general damages from patrimonial loss would greatly facilitate the removal of general damages as a head of damages. There is also little doubt that if the courts persistently failed to adjust awards for general damages adequately for inflation they would in time reduce such awards to a negligible aspect of claims for personal injury. It has been suggested that this process is already well under way.[198]

[11.8.7] Military pensions: *Swanepoel*'s case[199] considered 'pigeonholing' of general damages outside the ambit of the Workmen's Compensation Act.[200] The benefit in question was a pension paid in terms of the Military Pensions Act[201] to a national serviceman injured while undergoing training. The Act specified that when assessing the pension to be paid no regard should be had to the earning capacity of the claimant in any particular occupation.[202] The schedule to the Act then specifies disablement percentages for different types of injury. After consideration of the Act the court came to the conclusion that the benefits provided thereunder were 'rather in the nature of a *solatium* for the totality of the consequences of the disablement, and particularly those that cannot readily be measured in monetary terms'.[203] It was accordingly held that the value of the pension should not be deducted from the claim for loss of earning capacity. The court then observed that 'there is indeed no norm for determining in monetary terms the extent of such general damages'.[204] It was then ruled that not even the claimant's general damages were to be reduced by reason of the pension.[205]

[11.8.8] Contradicted principles: The *Swanepoel* decision is to be regretted for a number of reasons.[206] Firstly it is difficult to reconcile with an earlier ruling by the appellate division

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[197]Grosskopf Commission Report 1981 14.

[198]Newdigate & Honey 'The MVA Handbook' 150 suggest a method for predicting general damages awards from past awards. Their basis is a flat, ie non-compound rate, of 5% per year up to 1972 and 10% per year from 1973 onwards. The average flat rate of inflation between 1947 and 1973 was 6% per year (3,8% per year compound); between 1973 and 1989 the average flat rate has been 42% per year (13,6% per year compound). If the suggested basis is correct then awards for general damages are declining rapidly in terms of real buying power and doubt may be expressed as to the long-term validity of such a scheme.

[199]*Mutual & Federal Insurance v Swanepoel* 1988 2 SA 1 (A).

[200]Act 30 of 1941.

[201]Act 84 of 1976.

[202]s7(6)(e).

[203]*Mutual & Federal Insurance v Swanepoel* 1988 2 SA 1 (A) 11H.

[204]*Mutual & Federal Insurance v Swanepoel* 1988 2 SA 1 (A) 11I-J.

[205]The *Swanepoel* judgment makes the distinction urged by Van der Walt 'Sommeskadeleer' 425-48 but with consequences which Van der Walt certainly did not contemplate (see 'Sommeskadeleer' 204-5 205n27 quoted at 202). Neethling Potgieter & Visser 'Deliktereg' 2ed 241n315 express reservations with the proposition that collateral benefits should not be deducted from general damages.

[206]Article 47A of MMF agreement ito Act 93 of 1989 provides for the deduction of the present value of a military pension for all claims made in terms of this Act. For claims under the earlier acts a military pension remains non-deductible.

concerning similar legislation.[207] Secondly the classification of the pension as pure general damages for pain and suffering and loss of amenities of life seems misplaced. The pension[208] was more in the nature of the general damages that one finds awarded to an injured child,[209] a mixture of patrimonial and non-patrimonial.[210] Thirdly to state that there is no norm for the determination of general damages is to deny the normative value of the many reported cases reflecting the considered opinions of the courts in the past as to fair value in this regard.[211] If the awards for general damages which the courts have been making reflect fair compensation for the injuries suffered then any amount significantly out of line with such awards, after due allowance for currency depreciation, must be excessive and unfair.

[11.9] CAUSATION BY FACILITATION

If the chance of an event is increased or decreased by the wrongful act then this increase, or decrease, in the chance of the event is caused by the wrongful act. In other words the wrongful conduct **facilitates** the subsequent event.[212] The courts have not always been astute to take this view of causation:

[11.9.1] Narrow causal reasoning: It has been suggested that remarriage by a widow should be ignored when assessing her damages because it is not 'caused' by the original wrongful act.[213] If such causal reasoning is correct then it follows that for personal injury a victim may argue that his prospects of finding alternative employment after the injury should be ignored because the taking of the new employment is not 'caused' by the injury. Such an approach to compensation for personal injury or death may be likened to assessing damage to a motor car without regard for the scrap value of the vehicle.[214] The remarriage is

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[207]The same wording in the War Pensions Act 82 of 1967 was held to cover both patrimonial and non-patrimonial loss: *Casely v Minister of Defence* 1973 1 SA 630 (A) 642 'Even though... the claim... for non-economic loss for pain, suffering, shock, disfigurement, and loss of amenities is anomalous and regarded as a kind of *solatium*... it nevertheless still is an indivisible part of that single cause of action of the disabled person'.

[208]s20 of the Military Pensions Act 84 of 1976 states that compensation under the Act shall be in substitution for any claim for damages which may arise against the state.

[209]*Mashini v Senator Insurance* 1979 3 C&B 82 (W); *Assur v Protea Assurance* 1981 3 C&B 196 (C); *Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1085.

[210]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 112-13 'A Court is entitled... to award a globular amount in respect of general damages including loss of earning capacity'. *Casely v Minister of Defence* 1973 1 SA 630 (A) 642

[211]See the cases reported in Corbett & Buchanan; Visser 1988 *THRHR* 468 484. The medical ability to transplant organs of the body has given rise to a form of market in such parts with prices being paid (*Time Magazine* March 13 1989 88; February 20 1989 16; June 17 1991 52).

[212]See 20.

[213]'Die hertroue van 'n weduwee... is egter nie gevolge wat uit die dood van die betrokke eggenoot... voortvloei nie, en dus nie juis op logiese gronde gesien word as faktore wat by die bepaling van 'n weduwee... se vergoeding in aanmerking geneem moet word nie' *Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A) 614B-C.

[214]It seems that in the classical Roman law partial loss may have been compensated in some cases as though there had been total destruction (Kaser 'Roman Private Law' 214; Lee 'Roman Law' 4ed 395-6; Leage 'Roman Private Law' 3ed 410-11). The last two sources conclude on grounds of common sense that the Roman law could not possibly have been so harsh as to award the full value of the *res* when a residual value remained. If one bears in mind that damages during this period were viewed as composition rather than compensation the conclusions drawn by Lee and Leage are by no means necessary. The modern practice to ignore insurance payments may well be

'caused' by the wrongful killing in the sense of being facilitated. Remarriage is in this contingent sense a normal foreseeable event[215] that follows upon the death of a spouse.

It has also been ruled that the adoption of a child after the deaths of both parents is not caused by the death and must thus be ignored when assessing the child's damages for loss of support.[216] In general the reasonable man would consider adoption to be a normal consequence of the death of both parents.

Similarly narrow causal reasoning has been used to justify the non-deduction of accident insurance benefits, it being held that the payment of the benefits was not caused by the accident but by the taking out of the insurance.[217] The payment of insurance benefits is a normal and foreseeable consequence of an injury or death. The Assessment of Damages Act[218] states that pension and life insurance benefits 'payable as a result of the death' are to be ignored when assessing damages for loss of support. The words 'payable as a result of the death' imply payable as a normal and foreseeable consequence of the death.[219] If the taking out of the insurance were to be viewed as the cause of the payments then the intention of the legislature would be subverted.

The question of causation by death also arises in a non-damages context. An estate duty statute rendered dutiable 'Any lump sum benefit which becomes recoverable in consequence of or following upon the death of a member'.[220] The rules of a pension fund provided that 'The committee may in its discretion commute the whole or any part of any pension... for a single lump sum'.[221] The court ruled that:

> 'Upon the grant of a pension to the dependant, the death of the member ceases to have any operative effect. The decision of the committee is "the intervention of an independent, unconnected and extraneous causative factor or event" which isolates the death from the final result'.[222]

The statute clearly seeks to define causation in the broad sense of the normal foreseeable consequences of the state of death. The court does not seem to have considered this interpretation at all and busied itself with a choice between the patent absurdities of the *conditio sine qua non* test and a narrow interpretation of causation. It is notable that the

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viewed with equal disbelief by a commentator 1000 years from now.

[215]In the sense of a 'reasonable possibility' (see *Smit v Abrahams* 1992 3 SA 158 (C) 165F).

[216]*Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A).

[217]*Bradburn v Great Western Railway Co* [1874-80] All ER 195 (Exch D).

[218]9 of 1969.

[219]In *Du Toit v General Accident Insurance* 1988 3 SA 75 (D) the court did not consider whether the payment of the widow's pension had been caused by the deceased's original contract of employment.

[220]*CIR v Shell SA Pension Fund* 1984 1 SA 672 (A) 676C-D.

[221]*CIR v Shell SA Pension Fund* 1984 1 SA 672 (A) 676H.

[222]*CIR v Shell SA Pension Fund* 1984 1 SA 672 (A) 679G.

court did not investigate what decision the committee *usually* made following a death. Such an inquiry would have revealed that the committee almost invariably exercised its discretion in favour of the payment of a lump sum. The reasonable man would certainly have viewed the resulting payment to be one of the normal and foreseeable consequences of the death.[223]

[11.10] SUBLIMINAL WRATH

[11.10.1] Damages are not punishment: An award for 'punitive damages' is contrary to the Roman-Dutch law.[224] Modern jurisprudence has rationalized the award for general damages as compensatory, but one may speculate with some confidence that subliminal punitive considerations of revenge or punishment attended the introduction of this aspect of compensation for personal injury.[225] It is notable that some of the Roman-Dutch texts state that the award for general damages is only to be ordered **if expressly demanded.**[226] This suggests an ethic that general damages for pain and suffering and loss of amenities was a form of palliative ('troosgeld') directed at satisfying a felt need by the claimant for revenge or punishment.

[11.10.2] Indications of irrationality: It has been said of the prevailing collateral-benefit rules that: With collateral benefits logic is conspicuous by its absence.[227] The complexity of collateral benefits cannot be resolved by a general concept of damages.[228] Such an analysis serves only to highlight the irrationality of ignoring certain benefits in the assessment process.[229] The subject is characterized by *ex post* rationalisations[230] and primitive thoughts of revenge.[231] The expression *res inter alios acta* suggests that some guidance

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[223]In this instance the chances of payment would have been better than a mere 'reasonable possibility' (see *Smit v Abrahams* 1992 3 SA 158 (C) 165F 178C).

[224]Erasmus 1975 *THRHR* 362 364-6; *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 171E-F 'The claim under the *Lex Aquilia* for economic loss... is wholly compensatory... and it embodies no punitive element'. See too *LAWSA* vol 7 paras 5 13.

[225]The Roman-law rule that the body of a free man has no patrimonial value (Davel 'Skadevergoeding' 7-9) prevails in our modern law with the prohibition on an award for general damages in the event of death (*Union Government v Warneke* 1911 AD 657 667; *Hulley v Cox* 1923 AD 234 243). The fact of the no-value rule renders it highly likely that the award for general damages has its origin in considerations of punishment and solace rather than notions of a commercial value for pain and suffering and the loss of amenities, as we find in our modern law (*Southern Insurance v Bailey* 1984 1 SA 98 (A) 117-18; *Gerke v Parity Insurance* 1966 3 SA 484 (W)).

[226]Grotius *Inleiding* 3.34.2 '*De smert ende ontciering van't lichaem... werden op geld geschat, soo wanneer sulcks versocht werd*'. The same proviso is recorded by Voet *Ad Pandectas* 9.2.11.

[227]Van der Walt 1980 *THRHR* 1 2 'logika glo skitter deur sy afwesigheid'; Boberg 'Delict' 491 'None of the explanations is entirely satisfactory'; Reinecke 1988 *De Jure* 221 223.

[228]Van der Walt 1980 *THRHR* 1 4.

[229]There has been general criticism of the paradox of double compensation: *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 150-1.

[230]Van der Walt 1980 *THRHR* 1 5.

[231]Van der Walt 1980 *THRHR* 1 26 'Allerlei primitiewe wraakgedagtes agter 'n eenvoudige billikheidsoordeel mag skuil'. Boberg 'Delict' 570 writes of 'society's sense of outrage' in relation to general damages. Mundell 1987 *THRHR* 379 384 writes of 'legalised vengeance'. The punitive overtone is notable. Group feelings, the feelings of the *sib*, were markedly relevant under the Germanic law. Their relevance today is not quite so obvious with State managed criminal sanctions and a judiciary of sufficient independence to stand above mob justice.

may be found in the rules of evidence, but this is not necessarily so.[232] Causation is a popular but fallacious *ex post* rationalization.[233] Van der Walt finds a common thread in an irrational desire for punishment and revenge.[234] Judicial suspicions of a *possible*[235] popular sense of public outrage[236] may be allowed to override reason.[237] McKerron[238] justifies the non-deduction of collateral benefits on the ground that 'the law of delict plays an important part in supplementing the criminal law in enforcing adherence to standards of conduct'.

[11.10.3] Judicial discretion: Under circumstances of catastrophic injury or death it is by no means clear to what extent the courts are able to maintain an objective attitude towards patrimonial loss. On one hand it has been said that 'We cannot allow our sympathy for the claimants in this very distressing case to influence our judgment'.[239] On the other hand 'the trial judge has a large discretion to award what under the circumstances he considers right'.[240] An objective standard of value for general damages has been encouraged.[241] Corbett & Buchanan, however, express doubts that such an objective standard has been maintained by the courts.[242] Although a judicial discretion is undoubtedly desirable it does leave the way open to decisions based upon prejudice or an intuitive sense of outrage, rather than objective and rational considerations.[243] The shadow of *versari in re illicita* may be

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[232]Van der Walt 1980 *THRHR* 1 9.

[233]*Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 151F; Van der Walt 1980 *THRHR* 1 21.

[234]Van der Walt 1980 *THRHR* 1 12 23 24 25 26; *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 151F 152E.

[235]Luntz 'Damages' 2ed para 8.1.02 'In the United States, where the collateral source rule applies even more widely than in Anglo-Australian law, juries are said to be as much opposed to it as academic writers; their notorious sympathy for plaintiffs does not extend to compensating for losses already made good'; (see too Cooper-Stephenson & Saunders 'Damages in Canada' 498-500). Atiyah 'Accidents Compensation & the Law' 3ed 215 notes that a jury verdict is as close as one can hope to come to a deed poll. These considerations suggest that judicial presumptions as to popular opinion may not be borne out by proper inquiry.

[236]For instance 'It would not be in the public interest to allow a wrongdoer to benefit' *Victor v Constantia Insurance* 1985 1 SA 118 (C) 125A3; 'It would be revolting to the ordinary man's sense of justice... that the only gainer would be the wrongdoer' *Parry v Cleaver* [1969] 1 All ER 555 (HL) 558C-D.

[237]Van der Walt 1980 *THRHR* 1 24n65 'Die gevoel van onbehaaglikheid wat soms spontaan ervaar word moet dus buitengewoon noukeurig getoets word'; Mundell 1987 *THRHR* 379 384 'The fault system reveals... a marked failure to correlate the fault and the punishment'.

[238]McKerron 1951 *SALJ* 373.

[239]*Hulley v Cox* 1923 AD 234 246. Atiyah 'Accidents compensation & the law' 3ed 550 states that punitive desires are to be resisted.

[240]*Legal Insurance v Botes* 1963 1 SA 608 (A) 614E-G.

[241]*Radebe v Hough* 1949 1 SA 380 (A) 'The amount of damages to be awarded for pain and suffering should not vary according to the standing of the person injured'.

[242]Corbett & Buchanan 3ed 8n64.

[243]Van der Walt 1980 *THRHR* 1 24n65 26; Mundell 1987 *THRHR* 379 384; Atiyah 'Accidents Compensation & the Law' 3ed 550; Hahlo & Kahn 'The SA Legal System' 65 'The notion that legal problems can be solved by an unaided enlightened discretion is "a horrible abomination, more to be feared than a dog or a serpent"'.

detected in some dicta concerning collateral benefits.[244]

[11.10.4] Policy decisions: There is little doubt that a court is not obliged to rely on logic and reason if there are sound policy considerations for taking a different view.[245] One may question, however, whether a judge's unconfirmed suspicion[246] of a popular sense of outrage[247] really justifies an irrational policy decision.[248] Logic and reason provide safeguards against errors of judgment prompted by emotional considerations.[249]

The opinion has been expressed that policy decisions by the courts 'are rather vague and unspecific, not pertinently indicating or fully discussing the actual policy considerations motivating the decision'.[250] The forensic mysticism that so often attaches to the treatment of collateral benefits provides further evidence in support of this opinion.

[11.10.5] The morality of logic: It has been said of a rule for the non-deduction of collateral benefits that because it is a rule of law it must be fair.[251] Such an argument is clearly fallacious[252] The assessment of damages for financial loss lends itself to the structured, as distinct from intuitive, reasoning. As I have noted previously there is a morality in logic and reason.[253] The greatest danger with the doctrine of the non-punitive nature of damages is that vengeful elements in the assessment process may be denied their true nature in order to render the doctrine valid.

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[244]See footnote 236.

[245]Friedmann 'Legal Theory' 342-44 describes the 'free law theories' which reflect the extreme effect of providing a judge with a wide discretion to award what he considers right. Boberg Nov 1981 BML 25 27 states that 'Our courts... are entitled to prefer equity and convenience to the dictates of logic'.

[246]The courts do not rely on objective public opinion surveys when handing down decisions based on what is thought to be offensive to the public. In general a court will take judicial notice of what is perceived by the public to be good morals (see, for instance, Van Zyl 1988 *SALJ* 272 284-7).

[247]See footnote 243.

[248]Friedmann 'Legal Theory' 477-8.

[249]See, inter alia, Mullineux 1993 *De Rebus* 721.

[250]Van Aswegen 'Policy considerations in the law of delict' 1993 *THRHR* 171 191.

[251]There is a presumption that if it is law then it must be fair: 'There is nothing punitive in calling on a defendant to pay that which the law says is a just recompense for the injury the plaintiff has caused' *Parry v Cleaver* [1969] 1 All ER 555 (HL) 574H-I; see too Munkman 'Damages' 4ed 85n(a); *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 152H. It would be most disturbing, however, if such an attitude were to place rules of law above criticism or revision (see McGregor Nov 1965 *MLR* 629-41).

[252]One may point, for instance, to the ruling in *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) where the court recorded that its finding on the law produced an unfair result.

[253]'Logic... is concerned not with what men actually believe, but with what they ought to believe, or what it would be reasonable to believe' provided the underlying premises are valid: Ramsey 'Foundations of Mathematics' 193. By this one must understand sound logic, not clumsy dabbling ('n Mens kan met syfers goël' *AA Onderlinge Assuransie v Sodoms* 1980 3 SA 134 (A) 142C). There is logic in consistency; Ramsey 184-6. 'While the result of a actuarial computation may be no more than an "informed guess", it has the advantage of an attempt to ascertain the value of what was lost on a logical basis' *Southern Insurance v Bailey* 1984 1 SA 98 (A) 114D.

[11.11] CONCLUSIONS

Considerations of comprehensive compensation[254] and macro-economics suggest that there should be a general rule that all collateral benefits be deducted save where a third party has stipulated for reimbursement, or is otherwise entitled thereto. In those instances where the court has had regard to the interests of third parties the amounts involved should be listed in the judgment together with the overall award. The practice of allowing separate rights of action introduces procedural difficulties which are best avoided by allowing a single group action. The expression 'contract of employment' should be interpreted equitably to include all benefits for which the employee had a reasonable expectation.

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[254] See 50.

CHAPTER 12

DAMAGES FOR PERSONAL INJURY

Summary: *The expression 'loss of earning capacity' embraces both earnings and living expenses. 'Loss of earnings' and 'loss of earning capacity' should not be distinguished. Just as increased living expenses, damnum emergens, increase the compensation payable so too saved living expenses reduce damage suffered and thus the defendant's liability. General damages has a patrimonial aspect and awards must have some regard to the cost of goods and services in the community at large. Likely earnings and likely expenses are the criteria by which to measure earning capacity and further spending needs. The earning capacity of business capital should be distinguished from the earning capacity of the victim. Compensation for 'loss of earning capacity' includes loss of support for the victim's family. Illegal earnings are best dealt with by basing compensation on what would have been earned had the victim acted legally.*

[12.1] 'LOSS OF EARNINGS'

[12.1.1] All-embracing: A claim for damages for personal injury is often loosely described as a claim for 'loss of earnings' or 'loss of earning capacity'. The usual consequence of a bodily injury is a loss of earnings, past or future, plus a loss by way of *damnum emergens* in the form of medical expenses, equipment costs and, possibly, the need for an attendant.[1] For an injured woman the damage may take the form of a loss of home-making capacity[2] or a loss of the financial benefits of a notional future marriage.[3] The description of damages for bodily injury as a 'loss of earning capacity' focuses upon the usual, the most obvious form of the damage. With paraplegic and quadriplegic cases, however, the costs of medication, appliances and attendants will frequently constitute the major component of the claim. For other forms of injury, such as a broken hip, there may be substantial future medical costs by way of hip replacements and analgesics but, due to generous sick pay provisions, no loss of earnings.

[12.1.2] 'Pigeonholing': Some legal analysts have interpreted the expressions 'loss of earnings' and 'loss of earning capacity' in a 'pigeonholing'[4] sense to limit the extent of the

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[1]eg *Administrator-General SWA v Kriel* 1988 3 SA 275 (A); *Dhlamini v Government RSA* 1985 3 C&B 554 (W); *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C).

[2]*Erdmann v Santam Insurance* 1985 3 SA 402 (C) 406-9.

[3]*Commercial Union Assurance v Stanley* 1973 1 SA 699 (A) 704 705.

[4]See 200.

items which may be brought into account when assessing damages for bodily injury.[5] The rigorous application of such reasoning would preclude a claim for *damnum emergens*. This is clearly an absurd result. One may thus conclude that the expressions 'loss of earnings' and 'loss of earning capacity' are just convenient labels for a wide range of losses flowing from a bodily injury and claimable under the Aquilian action. The physical injury is the primary damage, the financial losses are consequential damage. One should not attempt to read too much meaning into the expressions 'loss of earnings' and 'loss of earning capacity'. It is otherwise with the expression 'loss of support' used to describe damages claimable in consequence of a death wrongfully caused. This does reflect limits to the range of losses which may be claimed under the dependants' action.[6]

[12.1.3] The three elements: The expression 'earning capacity' embodies a number of different concepts:

> ***[12.1.3.1] Work capacity***: This expression is to be preferred for describing the personality aspect of 'earning capacity' because it avoids reference to the patrimonial element of earnings. The capacity to work is not always exercised with a view to generating earnings, as in the case of the unsalaried social worker or the recreational woodworker. The capacity to work is undoubtedly an important amenity of life which is harmed or removed by serious physical injury.[7]
>
> ***[12.1.3.2] Earnings***: Work capacity is commonly utilised to generate earnings. Work capacity is not necessarily co-extensive with earning capacity because a variety of personality skills combine to generate earnings.[8] A loss of work capacity may give rise to a loss of earnings. In this sense the loss of work capacity is the primary loss suffered with bodily injury, the loss of earnings is a consequential loss. Earnings usually take the form of weekly or monthly payments of money. This is the measure of the utility of the victim's work capacity to the community at large. Work capacity is also exercised to save on expenditure: For example growing one's own vegetables or repairing one's own car. Such savings are patrimonial in nature and, if proven, will generally be compensated at a level commensurate with what it would have cost to acquire such goods or services in the open market.[9]

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[5]See for instance Boberg 'Delict' 530-1 538-40 575-7 588 610-11; Van Heerden 'Skadevergoeding en Belastingpligtigheid' *JC Noster* 1 8-9; *General Accident Insurance v Summers* 1987 3 SA 577 (A) 617. Narrow reasoning of this nature has led to a ruling in Canada that tax should not be deducted when assessing loss of earnings (Cooper-Stephenson & Saunders 'Damages in Canada' 181-95).

[6]*Legal Insurance v Botes* 1963 1 SA 608 (A) 614E 'It aims at placing them in as good a position, **as regards maintenance**, as they would have been in if the deceased had not been killed' (emphasis supplied). The ruling in *Evins v Shield Insurance* 1980 2 SA 814 (A) implies that if the death of a husband has caused the widow a loss of earnings such loss cannot be claimed under the dependants' action. See 273 below.

[7]Capacity to work is not listed as an amenity of life in *Administrator-General SWA v Kriel* 1988 3 SA 275 (A) 288 but is clearly implicit to the factors therein mentioned.

[8]Van der Walt 'Sommeskadeleer' 289; 1990 *THRHR* 140 141-2 ('persoonlikheidsaspekte'). See comments by Neethling 1990 *THRHR* 101 104.

[9]See, for example, *Erdmann v Santam Insurance* 1985 3 SA 402 (C).

[12.1.3.3] Present value: The earnings, or savings in expenditure, generated by the use of a capacity to work will usually occur in relatively small amounts over an extended period. For purposes of lump-sum compensation it is necessary to agglomerate these amounts into a single lump-sum present value. In certain contexts the expression 'earning capacity' includes the notion of the discounted lump-sum present value of expected earnings, the capitalized value.[10]

The above analysis reveals that 'earning capacity' is neither personal nor patrimonial but a concurrence of both. Neethling has proposed that earning capacity be included under a fifth class of legal objects.[11] It needs to be borne in mind, however, that the expression 'earning capacity' is capable of a diversity of meanings depending on context. Usage of the expression in this text generally contemplates a combination of 'work capacity', 'earnings' and 'present value'.

[12.1.4] Capital and income: The present value of future earnings will take account not only of the sum total of the earnings but also of the remoteness in time of such amounts, the discount for interest, and the uncertainty attaching to such amounts, the discount for risk.[12] The 'present value' of such future earnings is then something separate and distinct from the cash flow which it represents:[13]

> 'The assessment of damages for loss of earning capacity is in truth an exercise in valuation. It is quite true to say that what that capacity may reasonably be expected to produce is a factor, indeed a major factor, in the process of valuation... If a rental property has to be valued, the rent it might be expected to produce might well be a factor, indeed a prime factor, in assessing its value. But *the value assigned would not in any sense be a replacement of those rents*, though the only utility of the property may be the production of rent. That the property was currently vacant would not deny its value, nor would its current rental income necessarily reflect its maximum productivity'.[14]

> 'Skade is die ongunstige verskil wat deur die onregmatige daad ontstaan het. Die vermoënsvermindering moet wees ten opsigte van iets wat op geld waardeerbaar is en sou insluit die vermindering veroorsaak deur 'n besering as gevolg waarvan die benadeelde nie meer enige inkomste kan verdien nie of alleen maar 'n laer inkomste verdien. Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie.'[15]

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[10]See, for instance, *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 150A-C; *Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D (see quotation at 215 below). See too paragraph 3.5.5.

[11]Neethling 1990 *THRHR* 101 104-5.

[12]Grotius *Inleiding* 3.32.16 *'dat onzeecker ende toekomend goed niet soo veel waerd en is, als het zekere ende tegenwoordige'*.

[13]A mere shadow of a life plan (see 68).

[14]*Atlas Tiles v Briars* (1978) 21 ALR 129 (HC) 135-6 (emphasis supplied).

[15]*Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 150A-C; *Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D.

> 'The capacity to earn money is considered to be part of a person's estate and the loss or impairment of that capacity constitutes a loss, if such loss diminishes the estate'.[16]

> 'The object of the award under the present head is to provide plaintiff with a one-off lump sum representing the assessed present value of his lost future after-tax income stream, *but subject to the qualification that the award is not simply restitution of the lost income but a sum of money representing compensation for the actuarially determined chance that the plaintiff would have earned such income.* What is necessitated is an exercise involving the various future possibilities being expressed as percentage chances, or averages, and subject to contingency allowances...'.[17]

General damages will at times include allowance for loss of earning capacity.[18] General damages are valued in the same way as, for example, a farm, by reference to prevailing currency values.[19] It follows that the value of earning capacity and the value of the farm are of a similar nature. They both reflect a price at which a future expectation, the utility of a life plan, is exchanged for a single monetary amount.[20]

The quotations above proceed from the view that earning capacity is an asset in the claimant's patrimonium the value of which is reduced by the injury. The value of that asset is usually determined by reference to expected income.[21] Work capacity is non-patrimonial. It is an amenity of life. The asset in the claimant's patrimonium is not work capacity but the present discounted value of the income expected from the use of work capacity. A major objection to viewing the present value of earnings as a tangible asset in the victim's estate is that in the event of insolvency or divorce, it is not standard commercial practice to treat such an asset as forming a part of the estate. One cannot under normal economic conditions buy or sell an 'earning capacity' for a single lump sum.[22] The absence of a commercial market does not mean, however, that a value for the *res* cannot be determined.[23] The

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[16] *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 917C 920; Boberg 'Delict' 610sup.

[17] *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 61 (emphasis supplied).

[18] *Southern Insurance v Bailey* 1984 1 SA 98 (A) 112-13. See too *Dlamini v Government of RSA* 1985 3 C&B 554 (W) 587 '... there must be some interaction between awards for patrimonial loss on the one hand and the award for non-patrimonial loss on the other... I cannot ignore... what is a different head of damage but forms part of one and the same award'.

[19] *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 841 'In assessing general damages one is dealing, not with a monetary debt, but with the valuation of a non-monetary loss (just as) a valuer determining the present value of a farm would not use the currency values of the past'.

[20] Bloembergen '*Schadevergoeding*' 47, notes that a market includes allowance for all the possible uses to which the goods may be put (see quotation in footnote 22 at 8).

[21] 'Verwagte inkomste' (see quotation above).

[22] One can, however, purchase for a lump sum the right to an increasing series of future payments contingent on human life, ie an immediate increasing life annuity. In *Santam Insurance v Fick* 1982 (A) (unreported 24.5.82 case 282/79/AV) the claimant had contrived a tax avoidance scheme which included selling his earning capacity to one of his companies.

[23] See paragraph 2.10.1 (surrogate markets).

capacity to work is a right of personality and thus not transferable. Reinecke[24] has concluded that the absence of transferability does not mean that the *res* cannot be an asset in the estate or have a realistic value.

[12.2] DIFFERENCING METHODOLOGY

[12.2.1] Capitalize first: The view of earning capacity as a capital asset with a value equal to the present value of expected income is consistent with an assessment methodology which capitalizes first and differences afterwards. This methodology hypothesizes a patrimonium in which the present value of expected earnings is a capital asset. So too is the value of the chance of all other past and future gains and outgoes.

[12.2.2] Difference first: The artificiality of a notional patrimonium is avoided by restricting the analysis to the more familiar form of patrimonium which is encountered in deceased and insolvent estates. Such an approach reflects an assessment methodology which differences first and capitalizes afterwards.[25] The notion of a capital value for earning capacity is alien to such a methodology as too is the value of the chance of a loss. The lump sum is viewed as no more than a financial device to generate the payments of loss as and when required. Capitalization is thus not intrinsic to the assessment process but a procedural adjunct thereto dictated by the once-and-for-all lump-sum rule.[26]

[12.2.3] Damages as a series of debts: In *Hartley*'s case[27] the concept of a continuing loss was viewed as a continuing series of debts owing by the wrongdoer. This model may be criticized on a number of grounds: Firstly it implies that prescription should run separately on each individual item of loss as and when it falls due. Prescription for damages for personal injury or death generally runs from the date of the injury or death *in respect of all items of loss, past and future*. The debt that is claimed in the summons is an aggregation of numerous separate items. The itemization making up the overall lump-sum award reflects no more than the court's reasoning in arriving at the relevant lump sum.[28] The concept of separate debts is difficult to reconcile with an award for the value of the chance of an uncertain loss of earnings[29] or a deduction for general contingencies. As a general rule the concept of continuing loss tends to promote injustice. In one instance an injured claimant

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[24]Reinecke 1976 *TSAR* 26 31 'Oordraagbaarheid is dus nie die essensiële eienskap wat vermoënsregte tot vermoënsbestanddele verhef nie. Die gevolgtrekking is daarom onvermydelik dat vermoënsverwagtinge ook as vermoënsbestanddele kwalifiseer... Die eindresultaat is egter elke keer niks anders nie as dat gepoog is om 'n realistiese indien subjektiewe waarde vir die betrokke vermoënsverwagting te vind'.

[25]eg *General Accident Insurance v Summers* 1987 3 SA 577 (A) 613E-G 'voortdurende schade', ie 'continuing loss'.

[26]Van der Walt 'Sommeskadeleer' 280-315.

[27]*SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 838-9.

[28]*Rondalia Assurance v Gonya* 1973 2 SA 550 (A) 557-8; *Van der Plaats v SA Mutual Fire & General Insurance* 1980 3 SA 105 (A) 118G.

[29]*Chaplin v Hicks* [1911-13] All ER 224 (CA); *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 198; more generally see *Blyth v Van den Heever* 1980 1 SA 191 (A) 225-6; Neethling Potgieter & Visser 'Deliktereg' 2ed 207 208inf.

has been denied a right of action.[30] More recently the notion of separate debts has led to a refusal to allow loss of buying power on past losses.[31] It has been observed that the practice of damages assessment now tries to sit on two different stools.[32]

[12.2.4] Eclectic methodology: Damages assessment is an eclectic activity characterized by the absence of any one dominant methodology or theory. In practice assessments involve a hotch-potch of capitalize first and difference afterwards, and vice-versa. Once actuaries become involved there is a tendency for the capitalize first methodology to prevail.

[12.2.5] Superficial distinctions: A distinction is often drawn between the expressions 'loss of earnings' and 'loss of earning capacity'. The expression 'loss of earnings' usually arises when assessment is by way of an actuarial calculation whereas 'loss of earning capacity' arises when assessment is by way of gut-feel, a robust jury approach.[33] The distinction is more apparent than real. Thus the damages for an injury to a child may be assessed on either an actuarial basis or by using a robust unscientific jury approach.[34] Notwithstanding the different methodologies used for assessment, the resulting lump-sum awards have the same character in the sense of being something akin to the award for general damages.[35]

[12.2.6] Differential contingencies: In its original form the adjustment for general contingencies was something that was applied to the overall assessment after the necessary differencing had been completed. This approach failed to recognise that different risk profiles, that is to say contingencies, may apply to the two different earnings scenarios, injured and uninjured.[36] The technique is illustrated in table 13.
One is here dealing very much with the reduction in the value of an asset, as distinct from a reduction in the income which that asset represents. It will be noted that the net effect of the differential contingencies is an add-on contingency adjustment of R61909. For this reason the use of differential contingencies is sometimes described as 'reverse contingencies. It sometimes happens that an injured victim is provided with a guaranteed disability pension

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[30] *Coetzee v SAR&H* 1933 CPD 565 576 'I know of no case which goes so far as to say that a person who has as yet sustained no damage, can sue for damages which may possibly be sustained in the future' (a right of action was denied because the claimant had continued to receive his full salary from the railways); *Coetzee v SAR&H* 1934 CPD 221 (same claimant now dismissed from railways but denied compensation because prescription held to have run from date of injury *when loss arose*).

[31] 'The result which I have thus reached is not satisfactory... it seems unfair that he should be paid in depreciated currency' *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 841G.

[32] Neethling Potgieter & Visser 'Deliktereg' 2ed 233n247 'Dit wil lyk of die praktyk op twee stoele probeer sit en verdienvermoë beide as 'n afsonderlike bate en as toekomstige skade sien'.

[33] *Southern Insurance v Bailey* 1984 1 SA 98 (A) 114D3; Boberg 1964 *SALJ* 194 204-5; Koch 'Damages' 48.

[34] *Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D 113-14.

[35] See 68 and 215. See too *Nanile v Minister of Posts & Telegraphs* 1990 4 C&B A4-30 (E) A4-37 'It is a useful safeguard to have regard to both arithmetical and lump sum approaches'.

[36] See, for example, *Brijlall v Naidoo* 1961 1 C&B 266 (D) 271 'These risks which would have attached to the plaintiff in any event are... more likely to affect him in the future because of his disability'; *Hutchings v General Accident Insurance* 1986 3 C&B 737 (C) 744 (10% and 20%); *Venter v Mutual & Federal Versekeringsmpy* 1988 3 C&B 749 (T) 759 (10% and 25% - see table 13 at 219). Differential contingencies were rejected in *Shield Insurance v Hall* 1976 4 SA 431 (A) 443-5 but due to high risks attaching to pre-injury occupation.

TABLE 13 - DIFFERENTIAL CONTINGENCIES

	Uninjured R	Injured R	Net loss R
Earnings	548317	466960	81357
Contingencies (10% & 25%)	(54831)	(116740)	61909
Net earning capacities	**493486**	**350220**	**143266**

by his employer.[37] The contingencies attaching to the pension are usually far less than those attaching to earnings.[38] In such instances the percentage deducted for the uninjured condition may be substantially greater then the deduction for the injured condition.

[12.2.7] Earning capacity as an asset: Under circumstances where a clearly quantifiable loss of earnings cannot be identified it is often appropriate to assess a present value for earning capacity in the uninjured condition, **after a suitable deduction for general contingencies**, and then debate what proportion thereof has been lost.[39] This is a clear case where a standard actuarial calculation is used in the assessment of what is popularly described as a 'loss of earning capacity'. The actuarial calculation determines a fair overall lump-sum value for the earning capacity pre-injury, but not for the associated loss. In other words there is no explicit series of monthly or weekly losses that are capitalized by the actuarial calculation.[40]

[12.3] PAST LOSS OF EARNINGS

[12.3.1] Complicating factors: Boberg states that 'Past loss of earnings is simply a matter of proof'.[41] This statement rather oversimplifies the realities of assessment:[42]

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[37]See 183.

[38]The major uncertainty with a pension is the rate at which it will be escalated in future years (see 155).

[39]See for instance *Hutchings v General Accident Insurance* 1986 3 C&B 737 (C) 744 where there was virtually no explicit loss of earnings but a substantial loss by way of diminished 'earning capacity'.

[40]This point is of relevance if one bears in mind the unduly narrow view of continuing loss that has been taken by the appellate division (see paragraph 12.2.3).

[41]Boberg 'Delict' 531. The learned author clearly knows better for he has written in 1963 *SALJ* 538 548 'It is... true that the amount of income which he would have received during the period intervening between the accident and the trial is no more a sum certain and capable of exact arithmetical calculation than the income which he would have received after the trial, for both are subject to contingencies'.

[42]*Sigournay v Gillbanks* 1960 2 SA 552 (A) 557-8.

* When a self-employed person is injured one can only speculate as to subsequent earnings on the basis of past performance. This can be a highly contentious issue when the victim had been self-employed for only a few months.[43]
* During times of economic depression there is a high incidence of injuries to unemployed adults. One is then regularly concerned with assessing the value of the chance of obtaining employment during and after the pre-trial period.
* A variation of the previous problem is the employer who has gone out of business since the time of the injury or has been the subject of strike action and/or retrenchments.

On the whole the analysis of damages has tended to focus on past losses alone[44] with the assessment of future loss being viewed as an awkward, if perhaps embarrassing, judicial duty largely devoid of principles or adequate proof.[45] It is preferable, however, to view past loss as a special case in an overall assessment of hypothetical events.[46] Litigation tends to extend over many years. As the date for assessment is moved forward in time that which was future loss yesterday becomes past loss tomorrow.

Gratuitous payments of salary after the injury will generally be ignored when assessing the damages. The determination of what is 'gratuitous' is by no means a simple matter.[47]

If the claimant has been party to a partnership, or a company with several shareholders, then the losses caused by his injury will often not be suffered by him alone, but jointly with his partners or other shareholders. Only the claimant has a right of action for damages. It seems that the claim will be for that part of the loss that affects the claimant's share of the profits. The other partners, or shareholders, will suffer loss but not have a right of action for this loss. In this sense they are loss bearers in the same way that employer bears part of the loss by the payment of sick pay to a disabled employee.[48]

Loss of employment due to an injury will deprive the victim of an income on which to live during the period until which compensation is paid. During such times family members may be obliged to provide support by reason of the duty to do so. The value of such support should be deducted from the past loss because the person providing the support has his own right of action for the cost of providing support during the pre-trial period.[49] This deduction will also arise when a married person is injured and then supported by the other spouse. It will also be appropriate when an injured child, even a married child, returns to the parental home pending the payment of compensation.

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[43]In such circumstances one generally falls back on evidence of what was earned by the victim when last in formal employment.

[44]Bloembergen '*Schadevergoeding*' 18n3 for instance states that he does not deal in his thesis with future loss and the problems of evidence.

[45]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 114B-C.

[46]*Sigournay v Gillbanks* 1960 2 SA 552 (A) 557-8.

[47]See paragraph 11.5.1.

[48]See paragraph 11.5.1.

[49]See 193.

[12.3.2] Foregone utility: The assessment of past loss takes no cognizance of the reality of the victim's living expenses during the pre-trial period. If the family has been able to come out on a lesser income there will no financial loss by the time of the trial,[50] only the inconvenience of a lower standard of living. **The loss suffered is thus a loss of utility not a loss of money.**[51] For a married man the loss of utility is not suffered by him alone but also by his family.[52] In terms of utility theory it is quite correct to ignore the fact of the saved living expenses. **The award made is, however, more in the nature of general damages than patrimonial loss.** The award that is ultimately made may be needed to pay off debts, but more importantly there will usually be a saved element that is then available for discretionary spending on a luxury item, something that would not otherwise have been purchased, something hedonistic.[53] Capital expenditure can generally be deferred during the pre-trial period. The adjustment for past loss of buying power provides the victim with the same utility in terms of buying power as has been foregone during the pre-trial period.[54] This is not to say that the victim will now go out and purchase precisely those goods and services which he would have purchased had there been no injury[55]

[12.3.3] Claims by deceased estates: If the victim has died by the time of the trial the estate retains a right to compensation for past loss accrued to the date of death. Such an award will cover past medical and living expenses which have served to decrease the estate in the direct sense, that is to say, have rendered the estate available for distribution less than it would have been had there been no injury. The deceased victim may, of course, have adopted a cheaper style of living during the pre-trial period and thereby prevented any diminution in his estate. If one accepts that the award for past loss may include a hedonistic element, that is the difference between notional net income but for the injury and actual reduced living costs, then it follows that a deceased estate should not benefit from an award of money which would in any event not have been saved.[56] The justification for the award for past loss of

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[50]In the sense that the family will not be any poorer in terms of rands and cents than if the injury had not occurred.

[51]Bloembergen '*Schadevergoeding*' 85 '*Er kan ook schade zijn, al gaat er geen "money out of pocket"*'. See too Bloembergen '*Schadevergoeding*' 17. In general a victim is expected to mitigate his loss of utility by immediately purchasing a substitute mug of beer (*General Accident Insurance v Summers* 1987 3 SA 577 (A) 613C). The loss is then only a loss of money and not utility (see Bloembergen 55). For a financially destitute family the mitigation of living standards from borrowings or capital is not a viable option.

[52]*De Vaal v Messing* 1938 TPD 34 310 ; *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 305H; Bloembergen '*Schadevergoeding*' 79.

[53]Van der Walt 'Sommeskadeleer' 286 'Die gangbare wyse van skadevergoeding is deur die toekenning van geld. Slegs op hierdie wyse kan daar werklik met terugwerkende krag 'n ekwivalent verskaf word vir die eiser se verlore of verminderde vermoënswaarde. Daadwerklike herstel kan hoogstens daartoe dien om die verdere ontwikkeling van skadelike gevolge... te beperk - 'n ekwivalent vir vergane of verlore vermoënswaarde kan dit nooit wees nie'. See too Bloembergen '*Schadevergoeding*' 48. The word 'hedonistic' is here used not in the ephemeral sense of 'happiness' criticized by Visser 1983 *THRHR* 43 53 but in the sense of freedom of choice of life-plan. The selected life-plan may not lead to happiness but the sorrows will then at least have been self-imposed.

[54]See 171.

[55]Bloembergen '*Schadevergoeding*' 48 '*De benadeelde zich bijna altijd met de hem aldus toegekende vergoeding in onze op ruilverkeer gebaseerde maatschappij zo niet een soortgelijke zaak, dan toch wel iets gelijkwaardigs kan verschaffen... Die gelijkwaardige zaak zal hem dan ook weer gelijkwaardige mogelijkheden verschaffen... Het verschaffen van zulke gelijkwaardige mogelijkheden is een reëel uitgangspunt voor de schadevastestelling*'.

[56]*Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 304-5.

utility is that the victim will be able to indulge in additional expenditure with comparable utility to that by which the victim was short during the pre-trial period. If he is dead or permanently unconscious the justification for an award for past loss of utility falls away. If he has benefited by charitable assistance will the heirs be prepared to pass on part of the compensation money to the benefactor?[57] If the heirs are the wife or children of the deceased, as is usually the case, they will have shared with him the hardship and deprivation and it seems right that they should be provided with the full value of their past loss of utility, possibly with a deduction to allow for the deceased's share thereof. For the victim who dies without dependants there is much to be said for making no award for the hedonistic element of past loss. It is rare to find account being taken of past savings in living expenses.[58] For the totally unemployed victim it will often be appropriate to make a deduction for the saved costs of work clothes and travelling to and from work.[59]

[12.4] HOME-MAKING CAPACITY

[12.4.1] Who claims what?: Injury to a married woman may impair her ability to perform her household duties. Damages will be awarded for the cost of acquiring suitable substitute services. Historically this loss, both past and future, has been perceived as suffered by the husband.[60] The preferable view, however, is that the wife herself suffers a loss of work capacity and should be compensated for at least the future cost to herself of hiring substitute services.[61] If the husband has met part or all of the cost in the past then he has a right to recover this expense from the defendant.[62] The desirability of allowing the claim for future loss to the wife is particularly evident if one considers the risk of divorce, an event which may well be rendered more likely as a result of her reduced abilities as a marriage partner.

Injury to a husband may give rise not only to a loss of earning capacity but also to his ability to perform valuable duties in and about the home, such as gardening. The cost of replacing these services is a proper subject for compensation.[63]

[12.4.2] Compensation for notional expenditure: The incurred cost of providing substitute services is generally accepted as an adequate measure of the damages suffered. However, if utility is to be the basis for compensation then it would be proper to award compensation for inability to render the services even if the cost of substitute services has not been incurred. However, the services may for instance, have been provided free of charge by another member of the family or the family may just have made do under less-than-satisfactory conditions. Past loss of earnings, as I have observed, is usually

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[57]See 191.

[58]In *Marine & Trade Insurance v Katz* 1979 4 SA 961 (A) the 50% contingency deduction included allowance for saved living expenses (979inf). This percentage was reduced in respect of past loss of earnings (977G). The court record does not disclose whether savings in past living expenses were brought into account.

[59]See paragraph 12.5.2.

[60]*Abbott v Bergman* 1922 AD 53; *Plotkin v Western Assurance* 1955 2 SA 385 (W) 394E 395D.

[61]*Erdmann v Santam Insurance* 1985 3 SA 402 (C) 406-9.

[62]*Erdmann v Santam Insurance* 1985 3 SA 402 (C) 409F-G.

[63]See, for instance, *Hutchings v General Accident Insurance* 1986 3 C&B 737 (C) 745.

assessed without regard for the fact that the family may have lived on very little and/or charity during the pre-trial period. If proper evidence has been provided there seems to be no good reason why an analogous claim for the utility of lost services in the home should not be allowed even if no cash outlay has been incurred.[64] The pre-trial impecuniosity of many victims generally ensures that such expenditure is not a practical proposition.

[12.4.3] Loss of marriage prospects: Inextricably linked with homemaking capacity is the capacity to marry and manage a family. The ability to render services in the home is part of the *quid-pro-quo* that renders a marriage relationship viable. An injured woman is entitled to compensation for loss of the financial benefits of marriage.[65]

Injury to a young unmarried woman may destroy her prospects of marriage. The indications are that about 35% of married women go out to work.[66] Even if a married woman does work her income net of tax will usually be less than that of her husband, quite apart from periods of unemployment while bringing up children. It follows that for most women a loss of marriage prospects will involve a loss of the financial benefits of marriage, in the form of a loss of the support which would have been provided by a notional husband. The chances of marriage may not be eliminated but may be reduced. The likely financial standing of the notional marriage partner may be reduced. The risk of an unstable marriage may be increased. All these factors may be expressed as a loss of the chance of enjoying the financial benefits of marriage.

A woman who has lost all prospects of marriage cannot claim for the value of the services which she would have rendered in the notional home. The award of the value of her services presumes that there is a home in which to render such services. The more seriously injured woman may need an attendant for her personal care.

[12.4.4] Quantifying the loss: The problems of assessing a value for lost marriage prospects are much the same as arise with loss of support claims when a deduction is made for remarriage prospects.[67] One first estimates the likely level of support from a notional husband assuming marriage as a certainty. This calculation would include suitable allowance for notional children[68] and the chance that the claimant would have worked and partially supported herself. One then reduces the capitalized value of this prospect to allow for contingencies such as the chance that having regard to the injury she still has a small chance of marrying.

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[64]Bloembergen '*Schadevergoeding*' 107-8 maintains that when a medical doctor has treated his own wounds he should be compensated as though he had paid for the services from another. The victim has suffered the disutility of treating his own wounds and there seems to be no good reason why he should not be so compensated.

[65]*Commercial Union Assurance v Stanley* 1973 1 SA 699 (A).

[66]HSRC 'Marriage & Family Life' 318. The figure of 35% relates to 1980 and is up from the 20% observed in 1960. For graduate women the percentage is much higher, about 70%.

[67]See, for instance, *Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A) 614-15. This is an aspect of damages assessment which is generally unpopular with the judiciary, but it reflects an unambiguous application of the principle of valuation of a chance.

[68]See Kemp 'Damages' 3ed 95-6 for a discussion of the calculation of the costs of keeping a notional family.

Where an injured woman has lost both earning capacity and marriage prospects it will generally be appropriate to make awards under both heads, particularly where evidence indicates that the notional husband would have earned more than she would have done.

It is common to reduce an injured woman's loss of earning capacity for the contingency that she would have been unemployed during periods of childbearing. It needs to be borne in mind, however, that while unemployed she would receive increased support from her notional husband. For career women[69] and families with relatively low incomes one can expect very short absences from work due to pregnancy.[70]

The are no reported judgments concerning a married woman who by reason of her injuries has lost her husband and the support that he was providing. This probably reflects a general misconception that loss of support cannot be claimed under the action for 'loss of earning capacity'.[71] There will also be problems with proving causation and it will at times be necessary to make a deduction for the chance that divorce would have supervened in any event. There would then be the loss of the chance of contracting a subsequent remarriage.

In general the approach to assessing the value of lost marriage prospects is to equate the claimant's earning capacity to the support she would have received from a notional husband.[72] Boberg[73] motivates this approach on the grounds that by reason of being unable to marry the claimant must now go out and work to support herself, but is unable to do so. The danger of this approach is the secretary who can prove that she would probably have married a surgeon. She would assuredly be undercompensated if her claim were based on her earning capacity alone.

For an injured woman the loss of the financial benefits of marriage will generally give rise to an increased award. On the other hand for a man who suffers reduced marriage prospects there is an associated saving in living expenses, the financial benefits that a notional wife and children would have enjoyed. Even handed justice suggests that if one is to make an add-on for the woman one should make a deduction from the man's damages and there are judgments where such a deduction has been made.[74] The one instance where an attempt has been made to use an actuarial calculation to assess the value of future marriage prospects did not get a favourable reception:

> 'The various matters assumed are too speculative to allow for any accurate quantification. Whatever statistics are available can at best indicate average figures,

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[69]HSRC Marriage & family life 319-20.

[70]HSRC Marriage & family life (at 328) records the advantages in South Africa of cheap domestic labour and (at 330) the increasing tendency for employers to provide maternity benefits to working women.

[71]The women with the largest claims for loss of support will be those who were unemployed at the time of the injury.

[72]*Commercial Union Assurance v Stanley* 1973 1 SA 699 (A) 704(H); see too *Marine & Trade Insurance v Katz* 1979 4 SA 961 (A) 980A-B.

[73]Boberg 'Delict' 575-7.

[74]*Reid v SAR&H* 1965 2 SA 181 (D) 190F-H; *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1024.

> and there is no basis upon which to determine how Clive's position would have compared with the statistical average'.[75]

In the circumstances the court merely increased the deduction for general contingencies to allow for the relevant saving.[76] The court's rejection of the statistical average as a basis for assessment is to be regretted. Allowance for future marriage prospects is an everyday occurrence with damages for loss of support.[77] Statistical averages concerning general population mortality for coloureds were used by the court without demur.[78] Family statistics are also population averages and thus indicative of the likelihood of the relevant events such as average number of children and proportion of married women who work.[79] It has been said that an actuarial calculation is to be preferred to the court's 'gut feel'.[80] The emphasis by the court on particularity, that is to say concretization, has the effect of creating an insurmountable burden of proof for the defendant.[81] One can only express the hope that in future matters the courts will be less hostile to statistical averages as a means for filling evidential gaps.[82]

[12.5] LIVING EXPENSES

[12.5.1] Savings deducted: The expression 'loss of earning capacity', it has been noted, is a convenient label for a wide range of losses flowing from bodily injury. Not only does the award include allowance for loss of earnings but also for the present value of past and future expenditure on medication, appliances, and attendants. Just as increased expenditure will lead to an increase in the damages payable so too will savings in living expenses justify a reduction.[83]

It needs to be borne in mind that although the claimant's damages for patrimonial loss may be reduced by reason of saved living expenses, the same consideration may justify an increase to the award for general damages.

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[75] *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1024D-E.

[76] *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1027I-J. See too *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 66 69.

[77] *Legal Insurance v Botes* 1963 1 SA 608 (A) 617-18; *Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A) 614-15.

[78] *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1024-7.

[79] In general see HSRC 'Marriage & family life'. More particularly regard could be had to the circumstances of the claimant's family as a guide to what is usual. In *Southern Insurance v Bailey* 1984 1 SA 98 (A) 115-15 the court relied on the earnings of the mother of the claimant as evidence of what the child could expect to earn.

[80] *Southern Insurance v Bailey* 1984 1 SA 98 (A) 99D.

[81] See 31.

[82] See 15.

[83] Or as Boberg describes it in 1960 *SALJ* 438 445 'A wrongful act may affect a person's *capacity* to suffer loss'. See too Luntz 'Damages' 2ed paras 5.2.09 5.4.04 5.5.02; Cooper-Stephenson & Saunders 'Damages in Canada' 283-91; Luntz 1965 *SALJ* 6; Buchanan 1965 *SALJ* 457.

[12.5.2] Saved travel costs: Perhaps one of the most common and obvious of savings is the cost of work clothes and travelling to and from work. This justifies a deduction from both past and future loss of earnings or support of about 8%.[84] Allowance for this consideration may be included in the overall deduction for general contingencies.[85] The deduction will not be appropriate if the victim lived at his place of work[86] or continues to travel to and from work or, as often happens with domestic servants, was receiving additional payments to cover travelling costs. One may expect persons of higher income to use more expensive forms of transport.

Many employees are provided with a car for business purposes but permitted to use it for private purposes, sometimes subject to restrictions. The determination of a value to be placed on such a benefit is not without difficulties: In the first instance there is the total cost of the vehicle to the employer; in the second instance there is the saving that the employee enjoys by being spared the cost of providing his own vehicle. The cost to the employer is not generally a correct measure of the value of the vehicle to the employee: Quite apart from the question of mileage, an employer may provide a new vehicle whereas the employee may have made do with a second-hand vehicle, or made greater use of a vehicle already owned by him. Where an employee, such as a salesman or managing director, is provided with a status vehicle it would not always be correct to assume that such a status vehicle would have been purchased had the employee been looking to his private needs alone. On the other hand the benefit of a status vehicle would generally have a higher utility value than more economical transport, but the loss of this would seem to be more a question of general damages, the loss of an amenity, than financial loss. The values placed by the Receiver of Revenue on the use of company cars generally seem to provide a fair basis for resolving the issue, provided it is borne in mind that the value used for tax purposes has hitherto been less than full value of the benefit.[87]

The need for medical care and the purchase of household necessities may entail a continuing need to travel. In one instance it was held that the claimant should take care to arrange accommodation close to the necessary facilities.[88] In *Bennie*'s case[89] an award was made for the additional costs of travelling to the family holiday flat.

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[84]Deductions for travel costs were made in *Sumesur v Dominion Insurance* 1960 1 C&B 228 (D) 232-3 (7,5% deducted); *Maasberg v Hunt Leuchars & Hepburn* 1944 WLD 2 12 (9%). Street 'Damages' 110 argues that the deduction should not be made because where one lives reflects a chosen lifestyle rather than a necessity. The fact remains that a victim who no longer has to travel to and from work is spared those costs. There may of course be alternative costs with travelling for medical care.

[85]See Corbett & Buchanan 3ed 66 et seq; *Kontos v General Accident Insurance* 1989 4 C&B A2-1 (T).

[86]A lesser deduction may be made for the saved costs of occasional visits to a far-away home.

[87]The income tax values for the 1993/94 tax year would seem to have been about 75% of the true values. A suitable allowance for private use would then be 1,33 times the income tax value.

[88]*Shasha v President Insurance* 1990 4 C&B A2-8 (W) 'The provision of a motorised wheelchair goes a long way towards restoring the plaintiff to mobility in situations where previously she had been a pedestrian. Where previously she had walked to the shops or to visit friends now she may do the same by wheelchair, provided the shops and friends are reasonably close to her own proposed home in Umtata. It is her business to select the site of her home with that factor in mind'.

[89]*Bennie v Guardian National Insurance* 1989 4 C&B A3-34 (W) A3-43.

[12.5.3] Savings in the 'lost years': Most prominent amongst allowances for saved living expenses is the rule governing reduced expectation of life. Had the claimant not been injured the value of his earning capacity would have been assessed according to normal mortality rates. However, if the injury has reduced his expectation of life, then for compensation purposes the assessment is done on the basis of reduced life expectancy and no allowance is made for earnings foregone during the so-called 'lost-years',[90] that is to say the additional years that would notionally have been lived had there been no injury.[91] The rationale for this approach is that once a man is dead he has no further living expenses and his dependants have their own right of action by which to recover the loss.[92] In effect it is assumed that all income is consumed with the cost of living either by way of support for oneself or support for one's dependants.[93] Whatever might have been saved is treated as expenditure. This latter assumption is not all that unreasonable if one bears in mind that earnings tend to stop at about age 65 and living expenses must thereafter be met out of savings. Savings may also be temporary pending some major expense such as overseas trip or a new car.

[12.5.4] Yearly packets of loss: The approach of the courts to the 'lost years' appears at first blush to be somewhat anomalous in terms of utility theory. If the court is to restore the present utility of claimant's pre-injury life plan then one would expect the same total life utility to be crammed into a shorter lifespan, a short life but a merry one. This concept implies an increase in the yearly spending capacity over and above what would have been the case but for the injury. This increased discretionary spending probably gives very much greater satisfaction than expenditure on basic necessities and has essentially the same quality as an award for general damages for loss of the amenities of life. The practical effect of limiting compensation for patrimonial loss to the shorter lifespan of the claimant implies that utility is parcelled out in yearly *quanta* at the same level as had there been no injury.

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[90] *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 306F 'When a man is injured and as a result of that injury his expectation of life is shortened, his claim for compensation is... limited to the period during which it is expected that he will continue to live, and he has no claim for loss of savings beyond that date; he is not, notionally, kept alive until the date when but for the accident he would, actuarially, have died'.

[91] I use here the popular terminology whereby the claimant is assumed to die at the expiry of his expectation of life. In practice the standard actuarial calculation would have regard to the increased risk of death in each separate year (see 87).

[92] *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 306F 'A man who has been killed has no claim for compensation after his death; after that event he needs no support for himself and is under no duty to support his family. His dependants have their own action against the wrongdoer for the loss that they have sustained. If the wrongdoer is unable to pay, they may be able to claim support from the estate of the deceased, but that does not give the executor a right to claim from the wrongdoer earnings or savings that have been lost through the death of the deceased'. See too *Goldie v City Council of Johannesburg* 1948 2 SA 913 (W) 921-2.

[93] The presumption that all income is consumed with living expenses or savings is the norm for dependency claims: see *Jameson's Minors v CSAR* 1908 TS 575 605; *Smart v SAR&H* 1928 NPD 361 364-5; *Yorkshire Insurance v Porobic* 1957 1 C&B 90 (A) 93-4; *Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 725-6; *Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A) 488-9. Contra *Roberts v London Assurance (3)* 1948 2 SA 841 (W) 849; Davel 'Skadevergoeding' 110. The *Roberts* judgment was handed down prior to the *Lockhat* decision at a time when it was thought proper to compensate for loss of savings during the 'lost years' (*Goldie v City Council of Johannesburg* 1948 2 SA 913 (W) 922). As a general rule savings may be equated with hedonistic expenditure.

The disutility suffered by reason of the 'lost years' is then compensated through the award for general damages.[94] The reported cases in South Africa do not record an explicit separate award for loss of expectation of life.

[12.5.5] General damages for the 'lost years': It has been held that the general damages paid for loss of an amenity of life should be the same regardless of the financial standing of the claimant, rich or poor.[95] The same egalitarian reasoning suggests that the general damages awarded for the 'lost years' should be determined without regard to the victim's lost earnings,[96] or the savings that would notionally have been accumulated. There is little doubt that blind reliance on an actuarial calculation of savings during the 'lost years'[97] will produce absurd results when the claimant is unconscious or with very few years to live, and even more so if the claimant has died.[98] In such cases the award for general damages and for patrimonial loss should include little if anything by way of discretionary spending money. In many instances loss of the capacity to work will commonly be accompanied by loss of the capacity to enjoy discretionary spending to the full. Conversely the injured claimant who has been freed from the burden of working for a living will have far more leisure time to indulge in hedonistic activities, that is to say time to follow personal whims. This latter consideration suggests that in certain instances general damages for the 'lost years' should be assessed with some regard for the discretionary spending capacity which would have been available during those 'lost years'. The extent of this spending capacity, that is to say earnings not required for the necessaries of living, would give some indication of the degree of pleasure that has been foregone. This is, however, to allow patrimonial considerations to intrude into the assessment.[99]

[12.5.6] Institutionalization: Confinement to an institution at state expense will eliminate many of the usual costs of living. It is then appropriate to reduce the award for loss of

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[94] *Venter v Federated Employers Assuransiempy* 1978 2 C&B 756 (T) 759para2; see too Neethling Potgieter & Visser 'Deliktereg' 2ed 244.

[95] *Radebe v Hough* 1949 1 SA 380 (A). Corbett & Buchanan 3ed 8n64 'Despite this authoritative pronouncement, a study of awards made since *Radebe v Hough* raises doubts as to whether the courts have in fact adhered to the principle'.

[96] This is the approach in England: *Benham v Gambling* [1941] 1 All ER 7 (CA) (£200); *Oliver v Ashman* [1961] 3 All ER 323 (CA) (£200); *Pickett v British Rail Engineering* [1979] 1 All ER 774 (HL) (£750). South African cases on the subject, such as there are, do not identify an explicit amount for loss of expectation of life (see for instance *Venter v Federated Employers Assuransiempy* 1978 2 C&B 756 (T) 759p2).

[97] For an example of the approach to such calculations see Kemp 'Damages' 3ed 95-6.

[98] In *Pickett v British Rail Engineering* [1979] 1 All ER 774 (HL) the House of Lords awarded 'loss of savings' during the 'lost years' in addition to general damages, this being a reversal of the earlier ruling in *Oliver v Ashman* [1961] 3 All ER 323 (CA). Subsequent embarrassment for the House of Lords in *Gammell v Wilson* [1981] 1 All ER 557 (HL) led to the House requesting reforming legislation. The Law Reform Act was then amended by the Administration of Justice Act 1982 ss 4(2) 73(3) 73(4) thereby restoring the position as stated in *Oliver v Ashman* (and *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A)).

[99] *Southern Insurance v Bailey* 1984 1 SA 98 (A) 117-20 rejected the contention that a functional approach should be applied to the determination of conventional damages. 119H 'This does not mean, of course, that the function to be served by an award of damages should be excluded from consideration. That is something which may be taken into account together with all the other circumstances'. See too *Reyneke v Mutual & Federal Insurance* 1991 3 SA 412 (W) 428-9.

earning capacity to allow for this saving of the 'domestic element',[100] that portion of the claimant's income that would have been expended on housing, food, transport, recreation, etc. If the victim is married then the reduction may take account of the saved costs of supporting a wife and children,[101] presumably with due regard for the likelihood of a divorce and maintenance payments and remarriage by the wife. An unmarried unconscious victim will have no need for living costs other than what is provided by the institution. In such cases compensation may be restricted to the value of the costs of accommodation at the relevant institution, if any. If the accommodation costs exceed the victim's 'domestic element' then the award might be structured as one for loss of earning capacity plus an additional amount being the value of the costs of institutionalization less the 'domestic element' of the earnings.[102] Institutionalization may thus bring about either a deduction or an addition to the value of earning capacity, depending on circumstances.[103] It may even justify no explicit award at all for loss of earning capacity.[104]

[12.5.7] Expensive hobbies: A person with substantial income may have indulged in an expensive hobby, for example yachting or flying. His injury may now prevent him from continuing this hobby. It can be argued that his compensation for loss of earning capacity should be reduced for the savings that he now enjoys from no longer pursuing the expensive hobby.[105] This problem is really much the same as that relating to the problem of the 'lost years'. If the claimant retains sufficient work capacity after his injury to beneficially utilise the discretionary spending power in other hedonistic activities then no deduction should be made. However, the severely disabled, unconscious or mentally retarded victim will not be able to take advantage of the discretionary spending power and his compensation for loss of earning capacity may for this reason be reduced by eliminating part or all of the discretionary element. Allowance would probably be made for the contingency that had there been no injury the expensive pastime may have been discontinued in any event.

[12.5.8] Loss of marriage prospects: The injuries may prevent a young man from marrying, or at least greatly reduce his marriage prospects. For a married victim the injury may precipitate divorce proceedings. The victim will then have the prospect of being spared in

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[100]*Shearman v Folland* [1950] 1 All ER 976 (CA); *Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL) 921; *Roberts v Northern Assurance* 1964 4 SA 531 (D) 537G-H; *Marine & Trade Insurance v Katz* 1979 4 SA 961 (A) 979inf (the 50% contingency deduction included allowance for a 'domestic element'); *Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1086A-G; *Kontos v General Accident Insurance* 1989 4 C&B A2-1 (T) (50% by agreement between the parties). Contra *Bobape v President Insurance* 1990 4 C&B A4-43 (W) but the substantial 40% deduction for general contingencies (unexplained) gave rise to much the same end result as had explicit allowance been made for saved living expenses.

[101]*Fletcher v Autocar & Transporters* [1968] 1 All ER 726 (CA) 734H-I.

[102]In *Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL) 921g it was the estimated cost of future care which was reduced for the 'domestic element' and not the award for loss of earnings. Dr Lim was unconscious. There was thus no justification for a hedonistic element to the award. See too *Uijs v General Accident Versekeringsmpy* 1991 4 C&B A4-88 (C); *General Accident Versekeringsmpy v Uijs* 1993 4 SA 228 (A).

[103]An addition was made in *Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL).

[104]eg *Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1086A-G.

[105]*Fletcher v Autocar & Transporters* [1968] 1 All ER 726 (CA) 734.

part or whole the expense of supporting a wife and family.[106] The damages payable have, on this account, been reduced by the courts.[107] The general principle here seems to be the same as with reduced expectation of life. A deduction is to be made for the value of the chance of saved living expenses.[108] Allowance for the disutility[109] or utility of being deprived of the joys or tedium of family life is then a factor to be brought into account when assessing general damages.

A serious injury may give rise to the need for an attendant who will provide some of the care and companionship benefits that would otherwise have arisen in marriage. The saving from not having to support a wife and family may then be offset against the cost of the attendant rather than against earnings.

Injury to a married man may well be followed by his divorce and bleak prospects for remarriage. For a compensated victim this will not relieve him of the duty to support his children although it would be unusual for him to be burdened with paying maintenance to his ex-wife.

[12.5.9] Divergent opinions: Judicial views are divided on the proper treatment of saved living expenses.[110] On the one hand one finds typical pigeonhole thinking based on the notion that the claim for personal injury is a claim for loss of earnings.[111] On the other hand one finds a broad approach based on overall impression giving effect to the balance-sheet-of-life form of analysis.[112] In the *Lockhat's Estate* case[113] the appellate division opted for the broad approach and a deduction for saved living expenses. More recently in the *Summers* appeal[114] the court indicated its reluctance to make a deduction for saved

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[106]HSRC 'Marriage & Family Life' 318 indicates that about 35% of married women work and thus partly or wholly support themselves (for graduate wives the percentage is 70%). Children would generally be a financial liability to a husband unless the wife earns unusually well.

[107]*Reid v SAR&H* 1965 2 SA 181 (D) 190F-H; *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1023-4 1027I-J confirmed in *General Accident Insurance v Summers* 1987 3 SA 577 (A) 617; *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) '... the strong probability that plaintiff would have married and had a family had he not been injured and, with a family to support,, and even after paying less tax as a married person, would not himself have had the full benefit of his after-tax income' (At 60 the court ordered that the calculation for earnings but for the injury assume that the claimant would have married at age 30. At 69 the court notes that claimant had but a small chance of marriage now that he was injured).

[108]See 224.

[109]In *Bobape v President Insurance* 1990 4 C&B A4-43 (W) A4-54 the wife and family are viewed as a benefit. This benefit may, of course, be substituted by a hired attendant.

[110]*Kontos v General Accident Insurance* 1989 4 C&B A2-1 (T) (deduction approved); *Bobape v President Insurance* 1990 4 C&B A4-43 (W) A4-54 (deduction disapproved).

[111]See, for instance, *Gerke v Parity Insurance* 1966 3 SA 484 (W) 495B 'If a man remains unconscious for ten years after the injury his claim for total loss of earnings cannot be disputed'.

[112]*Roberts v Northern Assurance* 1964 4 SA 531 (D) 537B-H; *Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1086 A-G; *Reid v SAR&H* 1965 2 SA 181 (D) 190F-H.

[113]*Lockat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 305-6.

[114]*General Accident Insurance v Summers* 1987 3 SA 577 (A) 617.

living expenses but then declined to upset the finding of the trial court that a deduction should be made.

[12.6] INCOME TAX

[12.6.1] Tax status of award: The general principle governing taxation in the assessment of loss of earning capacity is that a deduction will be made provided the damages award itself will be free of tax in the hands of the claimant.[115] If the award is to be treated as taxable income in the claimant's hands then no deduction should be made for taxation when assessing the damages.[116]

[12.6.2] Tax on investment income: A corollary of this principle in relation to future loss of earnings is that allowance must be made for the notional tax which may accrue in respect of investment income earned on the award.[117] The cost of medical and prosthetic expenses will generally be tax deductible in the hands of the claimant.[118] Due to the general availability of investments subject to little or no taxation[119] the discount rate of return is in practice not explicitly adjusted for taxation.[120]

[12.6.3] Tax on notional earnings: It has been said that the approach of the courts to taxation in relation to lost earning capacity has not yet been finally settled by the appellate division.[121] In practice notional taxation will usually be deducted when assessing loss of earnings.[122] Discussions of taxation generally omit reference to one early ruling by the appellate division that tax should be deducted.[123]

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[115]A lump-sum award for lost future profits is capital and thus not taxable (*CIR v African Oxygen* 1963 1 SA 681 (A); *Taeuber & Corssen v SIR* 1975 3 SA 649 (A). A lump-sum award for loss of earning capacity is likewise not taxable (Boberg 1981 *BML* 25; Boberg 'Delict' 543).

[116]*Omega Africa Plastics v Swisstool Manufacturing* 1978 3 SA 465 (A) 475-6. When compensation is paid by instalments these payments constitute an annuity and are taxable (*KBI & MMF v Hogan* 1993 (A) (unreported 28.5.93 cases 663/91 & 683/91)). It follows that instalment payments should be assessed gross of liability for taxation. Revenue practice is not to tax instalments directed at meeting medical and prosthetic expenditure.

[117]*Pitt v Economic Insurance* 1957 3 SA 284 (D) 287; *Dorfling v Bazeley* 1961 1 C&B 128 (E) 132inf; *Oberholzer v Santam Insurance* 1970 1 SA 337 (N) 342E. This is a consideration more talked about than applied. In practice the diversity of possible investment opportunities, particularly growth investments, dictates an objective approach, the same discount rate of interest is used throughout: See for instance *Todorovic v Waller* (1981) 37 ALR 481 (HC).

[118]s18 Income Tax Act 58 of 1962 as amended.

[119]eg Share market equities, capital growth, owner occupied homes, inter alia.

[120]See 104 and 134.

[121]Van Heerden *J C Noster* 1 6-7; Van der Spuy 1991 *Consultus* 40 41-2 with regard to *Whitfield v Phillips* 1957 3 SA 318 (A) 345-7 and *Sigournay v Gillbanks* 1960 2 SA 552 (A) 568.

[122]Boberg 'Delict' 545 mid-page 'The preponderance of academic opinion seems to favour the *Gourley* approach (ie basing the award on the plaintiff's net, after-tax earnings)'; at 544inf 'Actuaries make a practice of deducting tax from estimates of future earnings, trial courts generally accept this, and the issue is seldom raised on appeal'. *BTC v Gourley* [1955] 3 All ER 796 (HL) was concerned with past loss of earnings only, a consideration that seems of little consequence. In *Oosthuizen v Homegas* 1989 (O) (unreported 13.7.89 case 539/86) the court, citing only Van Heerden *JC Noster* 1, refused to allow a deduction for taxation.

[123]*Victoria Falls & Transvaal Power v Consolidated Langlaagte Mines* 1915 AD 1 29 'The defendant cannot be called upon to compensate the plaintiff for the loss of such share of its profits as would in any event have been appropriated by the State'. Such a ruling presumes that the lump-sum award is tax-free in the hands of the claimant. More

The loss of earning capacity of a victim will sometimes be measured by the cost of employing a suitable assistant. This cost would often be tax deductible and should then be reduced for the associated reduction in tax liability.[124]

[12.6.4] Estimation of future taxation: It has been said that no allowance should be made for notional tax on expected future earnings because any deduction made may be widely wrong.[125] This focus upon remote possibilities is typical of an assessment philosophy which sees its function as being to 'predict' the future. The practical effect is an overemphasis on concretization.[126] In general the determination of compensation has regard to the value of the chance of an event.[127] A loss, and presumably a gain, will not be ignored just because of paucity of evidence.[128] Problems of jurisdiction no longer apply,[129] and were in any event of questionable relevance bearing in mind that a court may have regard to the value of the chance. Boberg records the actuarial practice to deduct taxation from estimated future earnings.[130] This is done on the assumption that prevailing tax rates will continue in future, subject to regular revisions to offset the effects of inflation, the so-called 'fiscal drag'.[131] An examination of table 14 suggests that this assumption may be unduly optimistic and that the deduction for general contingencies should be adjusted upwards for the risk that tax rates will in future not be regularly adjusted to offset inflation.

[12.6.5] 'Pigeonholing': It has been argued that no deduction should be made for taxation because the claim is for 'loss of earning capacity' and not for financial loss in general. This reasoning has been adopted in Canada but not without criticism.[132] I have already made the point that the strict application of 'pigeonholing' reasoning would require that no compensation be awarded for medical expenses and other *damnum emergens*.[133]

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recently in *Minister of Defence v Jackson* 1991 4 SA 23 (ZS) it has also been ruled that a deduction should be made for taxation.

[124]In *Muller v Mutual & Federal Insurance* 1993 4 C&B J2-56 (C) the evidence was that the claimant would have had a substantial tax loss even if she had not been injured. The cost of the assistant was thus awarded without deduction for any tax advantage.

[125]*Sigournay v Gillbanks* 1960 2 SA 552 (A) 568inf 'If such an adjustment were made it might well be widely wrong'. However, it has also been said that 'But in this world nothing can be said to be certain, except death and taxes' (Benjamin Franklin 1789). To make no adjustment for taxation is to ensure that the allowance is wrong.

[126]See 31.

[127]*Blyth v Van den Heever* 1980 1 SA 191 (A) 225-6.

[128]*Sandler v Wholesale Coal Suppliers* 1941 AD 194 198; *Whitfield v Phillips* 1957 3 SA 318 (A) 345inf 'At the most, (the court) can endeavour to assess, as best it may, the probabilities of what the decision of the Commissioner or the Special Court will be'.

[129]An appeal to the supreme court is now possible from a decision by the special court (s86 s86A Income Tax Act 58 of 1962). The problem of conflicting jurisdictions which daunted the court in *Whitfield v Phillips* 1957 3 SA 318 (A) 345inf has now fallen away.

[130]Boberg 'Delict' 544inf.

[131]Based on inspection of several hundred actuarial reports prepared for purposes of trial and examined by my office.

[132]Cooper-Stephenson & Saunders 'Damages in Canada' 181-95.

[133]See 213.

TABLE 14 - HISTORY OF TAX RATES FOR CONSTANT REAL INCOME

Year	*Nom Earnings Rpy*	*Average Tax %*	*Nom Earnings Rpy*	*Average Tax %*	*Nom Earnings Rpy*	*Average Tax %*	*Max Tax Rate %*
1968	3314	9,0	6628	16,5	13256	35,2	73,5
1969	3423	9,4	6846	17,5	13692	36,2	74,0
1970	3485	7,7	6970	11,1	13940	18,4	64,4
1971	3586	8,1	7172	11,7	14344	19,5	66,6
1972	3762	8,7	7524	13,4	15048	24,4	78,0
1973	4003	8,7	8006	14,8	16012	23,7	72,0
1974	4263	8,2	8526	13,5	17052	22,8	66,0
1975	4668	7,7	9336	13,5	18672	23,4	63,0
1976	5209	8,2	10418	15,0	20836	25,6	63,0
1977	5912	10,3	11824	19,0	23648	27,2	72,0
1978	6574	11,2	13148	20,5	26296	35,7	72,0
1979	7298	11,3	14596	20,3	29192	35,9	66,0
1980	8093	10,1	16186	20,1	32372	35,6	60,5
1981	9161	7,3	18322	15,7	36644	28,0	50,0
1982	10426	8,4	20852	17,8	41704	30,6	50,0
1983	12000	10,3	24000	21,1	48000	34,8	52,5
1984	13481	11,8	26962	23,3	53924	36,8	52,5
1985	15053	12,2	30106	23,7	60212	36,3	50,0
1986	17497	13,1	34994	25,2	69988	38,0	50,0
1987	20777	14,2	41554	25,6	83108	36,1	50,0
1988	24111	15,5	48222	27,2	96444	35,9	45,0
1989	27236	16,2	54472	27,8	108944	37,0	45,0
1990	31251	18,2	62502	29,4	125004	37,0	45,0
1991	35730	16,8	71460	28,0	142920	36,0	44,0
1992	41199	18,3	82398	29,2	164796	36,1	43,0
1993	47379	19,3	94758	30,6	189515	36,8	43,0
Average		**11,5**		**20,4**		**31,6**	

Based on rates for a married person with no dependants.
Source 'The Quantum Yearbook' 1993 53

[12.7] THE BALANCE SHEET OF LIFE

[12.7.1] Male victim: It is often useful to analyze a victim's life plan by analogy with a balance sheet reflecting the present capitalized values of each of the relevant financial

elements. The schematic in table 15 below contemplates a male victim prior to injury. In

TABLE 15 - MALE VICTIM NOTIONALLY UNINJURED

ASSETS	R1000's	LIABILITIES	R1000's
Gross earnings	900	Taxation	180
Services of wife	150	Own services in home	40
Chance of inheritance	50	Support self	350
House	200	Support for wife	230
Car	30	Support for children	270
		Bond on house	90
		Net patrimonium	**170**
Total	1330	Total	1330

order to assess the loss suffered the court must then construct a second similar balance sheet having regard to the effect of the injury on each of the individual components. The difference between R170000 and the net patrimonium having regard to the injury gives a first estimate of the damage suffered.[134] The court should then have regard to the effect of the award upon the patrimonium having regard to the injury and consider whether to modify the first estimate.[135]

The support required by the family may remain unchanged. The value of earnings may reduce but so too will the liability for taxation. The reduction in the value of earnings will be replaced by the lump-sum award of damages. A wise first investment would usually be to pay off the mortgage bond on the house. Any amount which is awarded for pain and suffering and loss of the amenities of life will, once compensation has been paid, become part of the victim's patrimony and indistinguishable, for investment purposes, from money paid for patrimonial loss.

If the victim will require expensive medical care and equipment the value of the cost of supporting himself would increase. If his wife has left him the value of the cost of supporting her, and perhaps the children, will decrease. Her departure will deprive the victim of, amongst other things, the benefit of her services in the home. These must then be compensated with the value of the cost of employing a housekeeper or attendant.

Modifications to the home necessitated by the injury, such as airconditioning, may enhance the value of the property.[136] The loss is the cost of the airconditioning less the enhanced value of the home. Many victims would have owned a motor car even if they had not been

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[134]See formula A at 60.

[135]Formula B at 60.

[136]Paraplegics, for instance, suffer from poor thermal control and require air-conditioning in their home (*Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 87-8.

injured. If they now require an automatic car with airconditioning compensation is for the increased capital and running costs. The basic cost of the vehicle is covered by the award for loss of earnings. For young victims the full cost of the first car might be awarded bearing in mind that but for the injury the first car would not have been purchased until several years later. There may be a deduction for the costs of public transport or a motor cycle. General damages will be reduced to allow for the enhanced status and standard of living which such enhancements provide.[137]

If there has been a reduction to the victim's expectation of life then the value of his earnings will reduce, but so too will the values for the cost to him of keeping himself and his family.

[12.7.2] Female victim: The balance-sheet schematic for a woman's life plan might be as in

TABLE 16 - FEMALE VICTIM NOTIONALLY UNINJURED

ASSETS	R1000's	LIABILITIES	R1000's
Gross earnings	320	Taxation	70
Services of husband	40	Own services in home	150
Chance of inheritance	5	Support self	350
Support from husband	230	Support for husband	0
Chance of 2nd husband	60	Support for children	30
Car	15	**Net patrimonium**	**70**
Total	670	Total	670

table 16. Some liabilities for a husband appear as assets for his wife, and vice-versa. The above schematic would be equally relevant for a young unmarried woman with good marriage prospects. The present values shown in the schematic would then be reduced for the chance that marriage may not come about. Most married women are faced with a small but real chance of having to support their children in the event of their husband's untimely death. The death, or a divorce, would give rise to a chance of support from a second notional husband. There might be a chance of inheriting from parents.

[12.8] LIKELY EARNINGS

[12.8.1] Expected earnings: The value of lost earning capacity is generally measured according to the standard of expected earnings.[138] For compensation purposes an 'expectation'[139] is best described as a 'personalized average',[140] that is to say an average which is modified, usually subjectively, to take account of all known information concerning

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[137]*Administrator General SWA v Kriel* 1988 3 SA 275 (A); *Ngubane v SATS* 1991 1 SA 756 (A) 786.

[138]'Verwagte inkomste', see *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 150A-C; *Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D; Bloembergen '*Schadevergoeding*' 105.

[139]See 15.

[140]Classical statisticians would object to this view of an expectation, but not Bayesians.

the individual and **the likely usage of his work capacity.**[141] The use of general statistical averages permits the court to fill in gaps where explicit evidence is lacking. The use of averages is consistent with the principle of damages assessment that a court must do the best it can with the information available.[142] The relevance of a statistical average depends on the extent to which it would influence a reasonable man in formulating his expectations of what is likely in the future.[143]

As a rule the best evidence as regards future earnings is that of the erstwhile employer of the victim. This is not always so, however, because some employers refuse to express an opinion as to the victim's future prospects while other employers paint an unduly rosy picture in the knowledge that they will never be called upon to 'put their money where their mouth is'. It is often useful to double check the opinion of an employer by reference to an industrial psychologist. The evidence of industrial psychologists, however, needs to be received with some care because their tests indicate potential earnings rather than likely earnings.[144] The more thorough industrial psychologists have close regard for the earnings of the victim's parents, uncles, aunts and siblings. The 'family culture' as regards employment will be indicative of the genetic and cultural background of the victim including family and peer-group pressures to succeed or to remain non-competitive.[145] For an injured child it will often be adequate to base compensation upon the earnings of the father[146] or mother[147] or a close mentor figure of the same sex.

In the modern South Africa there will for some years to come be substantial upward social mobility for the non-white classes. That justifies an optimistic approach to rising above the family background. One needs nonetheless to bear in mind that in Europe there is a surfeit of education and a shortage of job opportunities and that in time similar problems can be expected in South Africa. Qualified teachers and lawyers may well in time need to take jobs as bus drivers and bank clerks merely to earn a living. The greatest continuing demand for skills may well be in the trades such as plumbers, motor mechanics, welders, etc.

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[141] *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1020G 'In some cases it is proper for the Court to take into account not merely the plaintiff's lost capacity (what he *could* have earned had he not been injured), but rather the question of what use he would probably have made of his earning capacity (what he *would probably* have earned)'. See too *Wege v Elphick* (1947) 49 WALR 83.

[142] See footnote 126 at 24.

[143] Evidence may be admissible but its probative value may be reduced by its deficiencies (Hoffman & Zeffert 'Evidence' 4ed 116).

[144] See 30 and 152.

[145] It is easy to cite examples of persons who have achieved mightily despite a humble family background, and vice-versa. Such achievements indicate, however, only remote possibilities, not likelihoods. The fact that such achievements stand out for comment is itself indicative of their unusual nature.

[146] *Bopane v President Insurance* 1990 4 C&B A4-43 (W) A4-53 'There seems to me to be every reason to assume that Lawrence in all probability would have been able at least to achieve the level of advancement of his father but subject of course to the numerous hazards that beset the path both in life and education generally of all young persons'.

[147] In *Southern Insurance v Bailey* 1984 1 SA 98 (A) 115 the claim for loss of earnings was based upon the earnings of the mother of the injured child.

[12.8.2] Retirement age: The normal retirement age for the civil service in South Africa is age 65 for both men and women. For the armed services the normal retirement age is 60, and for the judiciary age 70. Pension funds generally focus on a 'normal retirement age' and then include rules governing the effect on pension benefits of earlier or later retirement. The state pension in South Africa is payable to men from age 65 and to women from age 60.[148] Morbidity rates, absences from work due to illness, have been observed to be higher for older men approaching retirement than for women of the same age.[149] The extent to which a person will continue working after normal retirement age will be strongly influenced by the extent to which there is adequate financial provision for retirement and the pleasantness of available work. Hall records in this regard:[150]

> 'The occupational career may be said to terminate with retirement, now mandatory only at age 70 (in the USA) but in fact often voluntary in the mid-sixties. But retirement, like entry, is for many a slow transition involving tapering off before or after official retirement and, in some instances, continuing to work in a more focused or specialized way or on a part-time basis. This is particularly likely to be the case when people have special knowledge or skills, as in the case of higher-level professions such as those of physicist, psychologist, lawyer, historian, and writer. The roles of worker and of pensioner thus also often merge during the retirement transition in a postoccupational career'.

[12.8.3] Loss of capacity to work: The capacity to work is a right of personality. Loss of work capacity is a factor to be taken into account when assessing general damages for loss of the amenities of life.[151] The present value of lost earnings, on the other hand, is a patrimonial loss. A millionaire may have chosen a life-plan of leisure, never to work. If he is seriously injured and suffers a loss of work capacity there is no loss of earnings, he suffers no patrimonial loss by reason of the impairment of his work capacity.[152] This does not mean, however, that his general damages will not be increased to allow for the loss of this amenity. As a rule, however, compensation for loss of work capacity and compensation for loss of earnings tend to be agglomerated without distinction being made.[153]

[12.8.4] Percentage disablements: An employed man may be injured. According to the tables used by the workmen's compensation commissioner[154] he may, for example, be 30% disabled. In practice he may be retained in his job and be 100% employed. Conversely a

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[148]R4440 per year since August 1993. There are proposals to increase the entitlement age for women to 65.

[149]Courant 1977 *TASSA* 108 112-17.

[150]Hall 'Career development in organizations' 98.

[151]'Work capacity' is not listed as an amenity of life in *Administrator-General SWA v Kriel* 1988 3 SA 275 (A) 288F. The amenities listed clearly imply work capacity.

[152]Bloembergen '*Schadevergoeding*' 105-6.

[153]eg 'Die verlies van geskiktheid om inkomste te verdien, hoewel gewoonlik gemeet aan die standaard van verwagte inkomste, is 'n verlies van geskiktheid en nie 'n verlies van inkomste nie' *Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A) 150A-C; *Southern Insurance v Bailey* 1984 1 SA 98 (A) 111D. Van der Walt 1990 *THRHR* 140 142 emphasises that earning capacity is the product of a variety of personality traits ('persoonlikheidsaspekte').

[154]In terms of the Workmen's Compensation Act 30 of 1941.

man with a 30% disability may lose his job and be 100% unemployed. There is no necessary correlation between work capacity and earning capacity.[155] However, in the absence of further information a fair approach to the above situations might be to assume some degree of correlation and allow the employed victim compensation of one half[156] of the degree of disability of, say, 30%, giving 15% of his earning capacity uninjured as the measure of the loss.[157] This recognizes that he is still in employment but that there is a 50% chance that his employer may give him lower increases in future years or that he may lose his job and have to work for 30% less than he is getting. For the victim who has lost his employment one might allow for a residual earning capacity of one half of 70% of earning capacity uninjured, that is to say 35%. This allows for a 50% chance that he will again find employment at a rate of pay 30% less than he would have earned but for the injury. The evidence of medical experts and the employer may permit one to assess chances different from 50% for the alternatives.

The extent of a partial loss of earning capacity may also be proved by evidence as to the cost of hiring an assistant.[158] This cost will usually be tax deductible and should then be reduced for the advantage of paying less tax.

The percentage partial disablement may include allowance for early retirement, although express allowance for this consideration may be made in the actuarial calculation.[159]

[12.8.5] Onus of proof: The claimant bears the onus of proof both as to the general fact of disablement and as to the extent thereof.[160] In *Van Almelo*'s case[161] the court stated that the degree of disablement must be proved by the defendant. In this instance, however, the claimant had already led evidence as to his preferred post-injury career path, that is to say had already discharged his onus. The defendant then had the right to bring evidence to refute claimant's evidence. The reference to onus in the *Van Almelo* case was thus misplaced. The defendant did not so much have an onus to lead evidence but rather a right to do so.[162]

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[155]"n Bepaalde liggaamlike gebrek bring egter nie noodwendig 'n vermindering van verdienvermoë mee nie of altyd 'n vermindering van gelyke omvang nie - dit hang o.a. af van die soort werk waarteen die gebrek beoordeel word' *Union & National Insurance v Coetzee* 1970 1 SA 295 (A) 300A; *Jones v Fletcher* 1948 1 C&B 234 (SR) 235; *Pitt v Economic Insurance* 1957 3 SA 284 (D) 288B.

[156]One half, ie 50%, implies that there is no evidence to sway judgment for or against the two alternatives of being 100% employed or 100% unemployed, or something inbetween.

[157]See for instance, *Boshoff v Motor Insurers* 1969 2 C&B 105 (W) 110 111.

[158]*President Insurance v Mathews* 1992 1 SA 1 (A).

[159]See 153.

[160]*Krugell v Shield Versekeringsmpy* 1982 4 SA 95 (T) 98-9.

[161]*Van Almelo v Shield Insurance* 1980 2 SA 411 (C).

[162]See paragraph 2.11.6.

Where suitable evidence is hard to come by the court will not non-suit the claimant.[163] However, a claimant who fails to lead available evidence may be non-suited.[164] With loss of earnings there seems to be a heavier burden of proof on the claimant than is required for *damnum emergens*.[165]

[12.8.6] Partially gratuitous earnings: A man may be 30% disabled but continue to work for the same wage as had he not been injured. It is possible to argue that part of the wage he now earns is gratuitous and should thus be ignored for purposes of assessing damages.[166] Such reasoning should be received with caution. It is extremely difficult to establish a fixed relationship between work capacity and earnings. The employer may have been underpaying the employee in the first place. The skill with which one negotiates a contract of employment is an integral part of earning capacity, but not necessarily work capacity in relation to the job to be done. Where there has been a long-standing employer-employee relationship the employee's knowledge of the particular circumstances of his employer enhance his utility to that employer notwithstanding the reduced value of the employee's work capacity in the open market.

[12.8.7] Mitigation of damages: A man who by reason of his injuries loses his job and his family[167] may have little motivation to return to work once he has received lump-sum compensation. The victim's likely earnings now injured may be nil notwithstanding modest injuries which leave him quite capable of gainful employment, albeit at a lower income than had he not been injured.[168] By adopting a cheaper lifestyle the victim is able to come out on less money than had he not been injured. Consideration of likely earnings now injured would suggest that this victim should be compensated for the full value of his earning capacity uninjured. In order to avoid the obvious element of overcompensation the victim is deemed to take up the employment of which he is capable and in this notional manner to mitigate his damages.[169] On a utility level one would say that by reason of choosing a cheaper lifestyle the victim has reduced his capacity to suffer loss, he has elected to forego hedonistic expenditure in favour of a more leisurely but frugal lifestyle. His balance sheet of life after the injury shows a nil value for the asset 'earning capacity' but a substantially reduced value for the liability 'living expenses'.[170] From a pragmatic point of view the

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[163]See footnote 126 at 24.

[164]*SA Eagle Insurance v Cilliers* 1987 3 C&B 716 (A) 728.

[165]See 242.

[166]*Santam Versekeringsmpy v Byleveldt* 1973 2 SA 146 (A). See 190 above.

[167]Usually through divorce but possibly killed in the accident.

[168]eg a successful dental surgeon may be reduced to employment as a university lecturer.

[169]See *De Harde v Protea Assurance* 1974 2 SA 109 (E); *Van Almelo v Shield Insurance* 1980 2 SA 411 (C); Boberg 'Delict' 479 622; *LAWSA* vol 7 para 32n2.

[170]See table 15 at 234.

victim who has been awarded 100% of his loss of earnings has little motivation to thereafter seek employment.[171]

If an injured wife gives up her employment to nurse her injured husband her damages will be limited to the lesser of her loss of earnings or the cost of employing a nurse.[172] If the wife's loss of earnings exceeds the cost of employing a nurse then the excess will not be compensated.[173] This may be rationalized either on the grounds that the damages should have been mitigated by employing a nurse or, alternatively, by observing that by foregoing the wife's additional income the family has elected of its own free will to adopt a cheaper standard of living. The quality of nursing services by a wife will usually be superior to that of a hired stranger.

[12.9] ADDITIONAL LIVING EXPENSES

[12.9.1] Likely expenditure: The previous section has focused on the question of likely earnings, the likely application of the victim's work capacity. The problem of the likely application of a capacity also arises in connection with future *damnum emergens* which is compensated by way of a lump-sum.[174] The victim has the capacity to incur future expense and by reason of the injuries, will in many cases be likely to incur such expense subject, of course, to various contingencies such as supervening death or other developments which may render the expense unnecessary.[175] **An important contingency is that the expense may have been incurred in any event, even if the victim had not been injured.**[176] Only

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[171] Atiyah 'Accidents Compensation & the Law' 3ed 598. For this reason disability-income insurance contracts seldom pay more than 75% of the earnings lost (except for up to 24 months immediately following commencement of payments).

[172] *Bennett v The Sun Insurance* 1952 1 C&B 391 (E) 394 'She took the place of a nurse whose services would have cost at least the amount claimed'.

[173] *De Harde v Protea Assurance* 1974 2 SA 109 (E).

[174] 'The claim for future loss of earnings is basically a claim for general damages... Not so, future medical treatment. This is a claim for special damages, which like past treatment, must be exactly quantified **on the basis of what will probably be required**' *Khoza v Minister of Law & Order* 1983 (W) (unreported 19.10.83 case 16967/82) (emphasis supplied). The distinction made here is really one between *lucrum cessans* and *damnum emergens* (see 46 above). With lump-sum compensation the present values of future expenses and future earnings are both in the nature of general damages (see 255 below). Reinecke 1976 *TSAR* 26 36 states that 'die verwagting onvermydelik (die feitlike aspek) en regtens geregverdig (die juridiese aspek) moet wees'. This seems to be a rather more strict requirement than the criterion of 'likely expenditure'.

[175] *Dlamini v Government of RSA* 1985 3 C&B 554 (W) 581-3 discusses the criteria for an award for future expenditure. The court's analysis fails to take account of the value of the chance that expenditure will be incurred and works instead with the all-or-nothing reasoning of balance of probabilities. The likelihood that expenditure will be incurred is then said to impact upon reasonableness (at 583). It is clear that the court is here labouring under the fallacy that the compensation money if properly invested can actually be utilised to meet the relevant expenditures. There is not the faintest suggestion of a perception of present value in the sense of a present utility modified to take account of the uncertainties.

[176] eg a servant or attendant may be needed in old age: *Page v Rondalia Assurance* 1974 2 C&B 524 (E) 532.

reasonable expenses will be allowed, not every item recommended by the experts.[177] There seems to be a close correlation between 'reasonable expenses' and 'likely expenses':

> '(The experts') approach is indeed laudable, but regard should be had to the plaintiff's own evidence and all the surrounding circumstances. I have the distinct impression that it is not the plaintiff's own desire to own and drive a motor-car, he is not a very sociable person. He shops and does other business only occasionally. It has not been proved to my satisfaction that a motor-car is a necessity or reasonably required or that the plaintiff is entitled to a motor car on any other basis. At the best it can probably be said that the use of a motor car adapted to his needs would be commendable. I do not regard that to be the test'.[178]

Reinecke[179] makes the point that one can only have the capacity to incur expenses if one has an adequate patrimony. In general the award of compensation will ensure that there is a patrimony. When damages have been apportioned due to the contributory negligence of the claimant it is conceivable that the patrimony will be inadequate to meet all the hypothesized expenses. The same problem arises with the deduction for general contingencies and the value of the chance of an expense.[180] Damages awarded under these circumstances are very much in the nature of general damages calculated by reference to patrimonial considerations.[181] In *Ncubu*'s case[182] it was held that the mother of an injured child had no right to claim damages because she did not have the means with which to incur the substantial expenses.

[12.9.2] Likely medical costs: It has been said that if adequate medical care is available then a victim is obliged to mitigate his damages by obtaining treatment at a state institution and thereby transferring the cost to the tax-payer.[183] On the other hand it has been said that a claimant is entitled to medical attention from a private practitioner.[184] It is sufficient for

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[177]*Ndlovu v Swaziland Royal Insurance* 1989 4 C&B E2-1 (Swazi) E2-6 'Her recommendations concerning the services and appliances required by the plaintiff are, I think, to some extent in the nature of counsels of perfection and I must remind myself that the Court is bound by the test of reasonableness in determining whether a particular type of expenditure is required'; *Wessels v AA Onderlinge Assuransiempy* 1989 4 C&B A3-19 (T) A3-22 'Ek kon egter nie die gevoel afgeskud kry nie dat mev Thompson ietwat oor-entoesiasties in haar algemene benadering tot hulpmiddels vir eiser is en dat redelikheid by haar aanbevelings vir verskeie sodanige hulpmiddels nie 'n rol gespeel het nie... Dr du Toit is insgelyks 'n deskundige op sy terrein met jarelange ondervinding maar ook hy het my die indruk gelaat dat hy nie altyd suiwer objektief was nie'; *Shasha v President Insurance* 1990 4 C&B A2-8 (W) '...the experts and, in particular, the architect have lost sight of the fact that what is required is reasonable compensation and not indulgence'.

[178]*Hughes v Santam Insurance* 1988 (W) (unreported 29.9.88 case 20704/86). See too quotations with footnote 196.

[179]Reinecke 1976 *TSAR* 26 36.

[180]See, for instance, *Pallas v Lesotho National Insurance* 1987 3 C&B 705 (ECD) 713.

[181]See 244.

[182]*Ncubu v NEG Insurance* 1988 2 SA 190 (N).

[183]*Williams v Oosthuizen* 1981 4 SA 182 (C) 185D-E 'He cannot indulge in expensive private treatment at the expense of defendant, provided he can get as good treatment in a public institution at the taxpayer's expense'.

[184]*Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 586 'He is reasonably entitled... to consult medical specialists of his own choice'; *Maja v SA Eagle Insurance* 1987 4 C&B B2-1 (W) held that a claimant is not obliged to accept a certificate guaranteeing free treatment at a state hospital. See too *Munro v NEG Insurance* 1988 4 C&B

claimant to lead evidence of the costs according to private medical tariffs. The defendant then has the onus of leading evidence as to alternative cheaper sources.[185] But what of the victim who is *prima facie* entitled to consult a private practitioner but who prefers to conserve his funds by attending at a state institution? This circumstance would suggest that the services rendered by the state institution are perceived by the claimant as being adequate and thus that compensation should be awarded accordingly. It can be argued that a claimant cannot demand private care as a right if in the normal course of events he would have used state institutions.[186]

A victim who no longer has to spend time at work cannot complain if instead he has to spend time waiting for attention at a state hospital, thereby utilising his free time to reduce expenditure. It is, of course, quite different for the victim who continues to hold down some form of employment. The need for regular hospital attendances may greatly reduce the chances that such a victim will remain employed. Such a victim is far more likely to make use of private medical care.

An approach to capitalizing medical expenses, fair to both claimant and defendant, would be to make an actuarial calculation on the basis of the cost of private care and then to make a greater or lesser contingency deduction depending on the perceived likelihood that cheaper services will be obtained.[187]

[12.9.3] Comparable social standing: The injury to a victim disturbs his life plan. Money has greatest utility to persons who aspire to moving up on the social scale.[188] The purpose of compensation money is not to render the victim upwardly mobile in the social sense, although in practice the lure of social status may well lead to the purchase of, for example, a prestigious motor car by a claimant who would otherwise have elected to make do with a purely functional vehicle. The victim is entitled to do with his compensation money as he pleases, and is not obliged to utilise it in the manner envisaged by the court.[189] The nature of a lump sum reduced for contingencies is such that even if the victim did meticulously follow the pattern of expenditure drawn up by the court the mere fact of above-average longevity would ensure inadequate funds. The determination of an award for future expenditure is essentially a costing exercise done in the knowledge that the reality will be

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F2-1 (D).

[185]*Ngubane v SATS* 1991 1 SA 756 (A) 784. See too *Magola v SA Eagle Insurance* 1987 (T) (unreported 10.4.87 case 8584/85). With loss of earnings, by way of contrast, the claimant must prove not only his residual earning capacity but also the reasonableness thereof (see 239 above).

[186]Bloembergen '*Schadevergoeding*' 212 records that the standard of medical care after injury should have regard to the type of medical insurance carried by the victim prior to the injury. See discussion in paragraph 12.9.3 of social status.

[187]In *Mitchell v Mulholland (2)* [1971] 2 All ER 1205 (CA) account was taken of the chance that free treatment would in time to come be obtained from a state institution. More generally see *Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL) 918b-d.

[188]Friedman & Savage 1948 *JPE* 279 298-9.

[189]*Malgas v Guardian Assurance* 1960 1 C&B 158 (A); *Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 583. See 245.

substantially different. The costs for which allowance is made in the calculations have to be based on some reasonable model for the victim's life plan as regards expenditure. The victim may personally have grandiose plans as to his future lifestyle once compensated. The court, however, is only obliged to concern itself with a life plan of similar social standing to that which would have prevailed but for the injury:[190]

> 'The choice offered has to be reasonable and realistic but relative to at least that to which the plaintiff was accustomed to and would have chosen, given his other means and limited needs'.[191]

Thus the costs of a motor vehicle for a paraplegic have been refused on the grounds that such person would in the normal course of events not have purchased a motor vehicle.[192] This is consistent with the principle that compensation for loss of earning capacity will have regard to the victim's likely earnings, and accordingly normal standard of living.

[12.9.4] Notional expenditure: The measure of *damnum emergens* is the cost incurred by the victim. Such costs, I have argued, must be reasonable having regard to the victim's injuries, life plan and social standing. It is common that prior to the trial the victim has not the means to incur necessary expenditure such as an attendant. This circumstance is analogous to the victim who has reduced his standard of living in order to come out on the reduced income to which he has been confined by his injury. A saving in living expenses will be ignored by the court when assessing past loss of earnings. However, a similar saving in *damnum emergens* will, as a rule, not be compensated.[193] The award for general damages would justifiably be increased to allow for the additional inconvenience, pain and suffering occasioned by not incurring necessary expenditure.[194] There is a general interaction between *damnum emergens* and general damages.[195] Thus, for instance, where an expense

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[190]See footnote 186. See too *Williams v Oosthuizen* 1981 4 SA 182 (C) 185C; *Shasha v President Insurance* 1990 4 C&B A2-8 (W).

[191]*Hughes v Santam Insurance* 1988 (W) (unreported 29.9.88 case 20704/86).

[192]*Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 587inf. The personality of the claimant in this matter was such that even if the value of motoring costs had been awarded it was unlikely that he would have acquired a vehicle. In *Ngubane v SATS* 1991 1 SA 756 (A) 782-3 the costs of a car were awarded to a low-income man who lived in remote parts to enable him to obtain medical attention. In *Shasha v President Insurance* 1990 4 C&B A2-8 (W) for an unlettered woman of lowly background the court refused to allow the costs of, inter alia, a computer and an architect designed home '... the experts and, in particular, the architect have lost sight of the fact that what is required is reasonable compensation and not indulgence'. See too *Hughes v Santam Insurance* 1988 (W) (unreported 29.9.88 case 20704/86) 'He has never shown a desire to own or drive a motor-car, and disabled as he is now, I consider him a poor candidate and a poor prospect for a driver's licence'.

[193]Bloembergen '*Schadevergoeding*' 111. However, at 108 Bloembergen states that where a medical doctor has treated his own wounds he should be compensated as though he had paid another for the services. The victim has suffered the disutility of treating his own wounds and there seems to be no good reason why he should not be so compensated, just as compensation should be awarded to the full-time housewife whose household chores have been increased by the burden of caring for her injured husband (provided nursing services were necessary).

[194]A good example of such expenditure is the purchase of medication to prevent the muscular spasms common in spinal injury cases. Anti-spasmodic drugs, such as lioresal, are extraordinarily expensive.

[195]See paragraph 12.15.6.

is large and dispensable, such as plastic surgery, compensation may be confined to the lesser amount of the general damages.

> 'But if the cost of operative treatment and incidental expenses or loss is such that it considerably exceeds the sum which would otherwise be awarded I do not think that a plaintiff can claim to be awarded the cost of the operation. The disfigurement, or disablement, or disability, might be slight while the cost of undergoing an operation with an incidental loss of earnings might be very considerable. If the cost of the operation and incidental loss were awarded, plaintiff might well abstain from undergoing the operation and might in that way recover a much greater sum for loss of amenities of life than he would have done if his condition had not been curable'.[196]

> 'There is a "reciprocal relationship between patrimonial and non-patrimonial elements in the total award of damages".[197] In determining whether a claimant reasonably requires an adaptive aid, this reciprocal relationship should not be lost sight of. Especially where the cost of the adaptive aid is disproportionately high in relation to the amelioration it would provide'.[198]

[12.9.5] Victim's stated intentions: If a victim indicates a flat refusal to undergo a necessary operation, such as a spinal fusion or amputation of an arm or leg, should the court refuse to award compensation for the cost of the operation or should the court allow for the possibility that the victim may in time change his or her view on the matter? The latter approach seems preferable, subject to a deduction for the value of the chance that the victim will persist in the present attitude.[199] However, what of the victim who insists on receiving treatment from medical experts in the United States of America when adequate treatment is available in South Africa? On one hand one might say he is obliged to mitigate his damages and be content with damages on the basis of South African treatment. On the other hand one might consider that after compensation has been awarded he may be so serious as to his intentions that he is prepared to incur the costs using his own money. It seems likely that South African a court will, in such circumstances, award compensation on the basis of treatment in South Africa.

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[196] *Light v Conroy* 1948 1 C&B 444 (T) 445; see too *Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 582inf; *Nanile v Minister of Posts & Telecommunications* 1990 4 C&B A4-30 (E) A4-33; *Administrator-General SWA v Kriel* 1988 3 SA 275 (A) 289G; Visser 1983 *THRHR* 43 52-3.

[197] *Administrator-General of SWA v Kriel* 1988 3 SA 275 (A) 287F.

[198] *Poo v President Insurance* 1992 4 C&B A3-96 (T) A3-107-8. In this matter the parties had agreed that the criterion to be used for allowable expenses was that 'the particular item of expenditure is reasonably required to remedy a condition or to ameliorate it' (*Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 552).

[199] In England s2(4) Law Reform (Personal Injuries) Act 1948 provides that when deciding upon the reasonableness of expenses the court shall ignore the possibility of free treatment in the national health services. This provision has been narrowly interpreted: *Harris v Brights Asphalt Contractors* [1953] 1 All ER 395 (QB) 'I do not understand section 2(4) to enact that a plaintiff shall be deemed to be entitled to recover expenses which in fact he will never incur'; *Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL) 918b-d.

In *Dusterwald*'s case[200] the claimant had by the time of the trial purchased a fairly expensive motor car. The award for future travelling costs was based on this type of vehicle. Conversely by the time of the trial the claimant had made little effort to take exercise in a swimming pool. The claim for the cost of a private pool was disallowed. In *Khuduge*'s case[201] the experts recommended that allowance be made for 12 visits per year to a general practitioner. The evidence indicated that claimant had been making only 4 visits per year. The court, having regard to the potential for complications, allowed 6 visits per year.

Bobape's case[202] was concerned with whether or not the child victim should be placed in an institution. The parents indicated their wish that the child should remain at home. Both parents were away at work all day. The court ordered that the child be institutionalised.

[12.9.6] Taxation: Medical and prosthetic costs will, in certain circumstances, be allowed as a deduction against taxable income.[203] Allowance for the chance of this advantage would probably be by way of a deduction for general contingencies, or an increase to the discount rate of interest.

[12.9.7] Freedom of action: It is said that a victim is entitled to do what he pleases with the compensation money.[204] That is to say that once compensation has been awarded **a court has no power to interfere** with the manner in which an adult victim, of sound and sober mind, spends or saves his money.[205] This is not to say that when assessing compensation the court may disregard what the victim is likely to do with the money having regard to what a reasonable person from that social and educational background is likely to do. Only reasonable expenses will be allowed, not every item recommended by the experts.[206] The concept of *damnum emergens* has no meaning without a model of expenditure for the future. Such a model, if meaningfully constructed, would include allowance for perceptions as to the likelihood, or otherwise, of various forms of expenditure. Consideration of the balance of probabilities tends to introduce an all-or-nothing approach to compensation. Consideration

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[200] *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 78-82.

[201] *Khuduge v Santam Insurance* 1991 (W) (unreported 23.5.91 case 4637/90).

[202] *Bobape v President Insurance* 1990 4 C&B A4-43 (W). The court considered a contrary ruling in *Hughes v Santam Insurance* 1988 (W) (unreported 29.9.88 case 20704/86).

[203] See footnote 118.

[204] *Malgas v Guardian Assurance* 1960 1 C&B 158 (A); *Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 583; *Bobape v President Insurance* 1990 4 C&B A4-43 (W) A4-54 'How Lawrence would have spent his money when he would have earned it is his choice and decision'; *Lim Poh Choo v C&IAHA* [1979] 2 All ER 910 (HL) 921g 'The courts in assessing compensation for loss are not concerned either with how the plaintiff would have used the moneys lost or how she (or he) will use the compensation received'. Bearing in mind that the court in *Lim*'s case then made a deduction for the 'domestic element' of earnings this passage states no more than that the existence of discretionary expenditure will be recognized.

[205] See *Malgas v Guardian Assurance* 1960 1 C&B 158 (A) where the court refused to make an order for curatorship without an application in proper form (rule 57 of the Uniform Rules of Court). It is otherwise with a minor: see *Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1088G-H. Once a minor has attained majority it seems that the requirements of the Rules of Court must be followed if the monies are to remain under the control of a *curator*.

[206] See footnote 177.

of the value of the chance of expenditure provides a more flexible and sensitive means for dealing with the issues.[207]

If one were to take the view that a claimant should be compensated for future expenses recommended by the experts, **but without regard for whether the claimant is likely to incur such expenditure,**[208] then the notional expenditure would become the monetary measure of the disutility of the injuries. There is nothing particularly undesirable about such an approach provided it is born in mind that the award of general damages is the primary measure of the disutility of the injuries. Disregard for the likelihood, the chances, that the claimant will actually incur the expenditure may then lead to the claimant being twice compensated for the disutility of his injuries. This would be an improper duplication of damages.[209]

[12.10] INSURANCE COSTS

[12.10.1] Life insurance: Serious injuries often bring about a reduction in the victim's life expectancy, that is to say that the risk of early death is increased.[210] If the victim now wishes to acquire life insurance cover this will cost more because of the increased risk of death. In theory this seems to be a legitimate claim but there are a number of complicating factors:

An important purpose of life insurance is to enable a breadwinner to provide for his dependants should his life be cut short. A victim who has been awarded a large sum of money by way of compensation has no need for life insurance because his dependants have the prospect of inheriting a large sum of money, the damages award, or at least what is left of it, in lieu of life insurance cover.[211] A victim who has no dependants has no need for life insurance in the sense of benefits payable on death. The dependants for their part have their own right of action for loss of support in those instances where the early death of the breadwinner has been caused by the wrongful act.[212] When assessing such damages life insurance and pension benefits are disregarded if they are payable as a result of the death.[213]

A second important function of life insurance is as a means of saving for retirement. Pure savings do not increase in cost because of an increased chance of early death. A victim who has a reduced life expectancy has less chance than a normal person of long life after retirement age, and thus needs to make less provision for retirement.

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[207]See chapter 4.

[208]For example the claimant may choose to use subsidised state hospital services despite having been compensated at the level of the cost of private medical care.

[209]See quotations with footnote 196.

[210]See 81.

[211]See 60.

[212]See 227, 347.

[213]Assessment of Damages Act 9 of 1969.

Quite apart from the availability of the award to reduce the need for life insurance, any extra costs of life cover are substantially offset by the reduced costs of funding retirement. In *Wessels'* case[214] a claim for additional life insurance costs was disallowed on the grounds that it was unduly speculative.

[12.10.2] Disability insurance: The term 'life insurance' generally includes insurance against disablement. This benefit is normally provided by employers or life insurance offices along with life cover. Where a victim has been totally disabled from ever working again, and fully compensated, he clearly has no need for disability insurance. Where the victim is subject to partial disablement he will still need insurance cover to protect his residual earning capacity. This will often be provided by the employer who will also meet any additional costs. Where the victim privately insures himself some doubt may be expressed that this can be taken into account by the court, bearing in mind that privately negotiated insurances are generally viewed as *res inter alios acta*.[215] Even if an award is to be made for the additional costs of disability cover this would be subject to a substantial deduction for the contingency that the victim may not keep up paying his premiums. The more usual manner of dealing with this problem would be by way of an increased deduction for general contingencies in respect of earnings in the injured condition.[216]

[12.10.3] Accident insurance: This type of benefit is provided by both life offices and short-term insurers. It is a form of disability benefit popular with blue-collar workers subject to high accident rates. The benefit usually takes the form of a so-called 'meat list',[217] that is to say so many rands if there is loss of use of an arm, so much for a leg, etc. The benefits, unlike many white collar disability benefits, are unrelated to earnings and have more the quality of gambling than insurance against loss.[218] Accident benefits issued by life offices often include a 'double death benefit', that is to say a double payment if death is caused by accident. Many injuries render a victim more accident prone and thus liable to additional costs for taking out accident benefits. Although the victim may be required to pay more for the benefit, he also has a better prospect than a normal person for being paid out. Considering the complexities it seems unlikely that a court would make an explicit award for the additional costs in this regard. An adjustment by way of general contingencies or general damages might be appropriate, but even this seems unlikely.

[12.10.4] Short-term insurance: It is conceivable that the disabled person who drives a car may be subject to an increased premium to cover the additional risk of damage to others. More likely such a victim, typically an epileptic, will be deprived of a driving licence and compelled to hire a driver. Claims for increased insurance costs arise most commonly for the costs of insuring expensive equipment such as wheelchairs. This additional insurance cost reflects part of the general contingencies, namely that replacement equipment may need

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[214] *Wessels v AA Onderlinge Assuransiempy* 1989 4 C&B A3-19 (T) A3-27-28.

[215] See 186.

[216] See table 13 at 219.

[217] Slang expression used by persons frequently engaged in the assessment of damages for personal injury.

[218] See 188.

to be acquired sooner than anticipated due to theft or accidental damage. These considerations are often built into the replacement frequencies estimated by the experts and care needs to be taken that there is not a double counting of the risk, that is to say shortening of the replacement period and an explicit allowance for insurance costs. Insurance premiums include a substantial component for the commissions and administrative costs of the insurer. Persons with extensive capital, such as a compensated victim, can achieve substantial cost savings by acting as self-insurers, that is to say by meeting the costs of replacing damaged or stolen equipment out of capital. For this reason it will usually be inappropriate to allow the full actuarial value of taking out comprehensive cover.

[12.11] MOTOR-CAR EXPENSES

[12.11.1] Luxury or necessity?: If a person would have owned a car in the normal course of events he may after injury be awarded the additional motoring costs necessitated by the injury.

In *Dusterwald*'s case[219] such costs included the difference between the purchase of a small manual gear-shift Volkswagen and a large automatic gear-shift Toyota Cressida with airconditioning. The larger car was substantially more expensive to run. The value of these additional costs was included in the compensation.

In *Ngubane v SATS*[220] the appellate division confirmed the award of the costs of a microbus to a claimant who lived in remote parts and needed special transport to obtain medical attention. In the normal course of events the claimant would probably never have owned a motor vehicle. No allowance was made for the advantages that family and friends might derive from the vehicle or the possibility that it might be put into service as a taxi with a hired driver. These considerations suggest a substantial deduction for general contingencies quite apart from a downward adjustment to the award for general damages.

By way of contrast in *Dhlamini*'s case[221] the court refused to allow the value of the costs of providing the victim with a motor car because 'he lived a simple life' and would not in the normal course of events have owned a motor car. The *Dhlamini* reasoning suggests that in *Dusterwald*'s case the cost of the bigger car should have been refused because the victim was likely never to have enjoyed the status of such a vehicle had he not been injured. Alternatively the fact of the purchase of the bigger vehicle would suggest an increased likelihood that such a vehicle would have been purchased in any event. The questions of peer pressure and family background do not seem to have been investigated.

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[219] *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 78-82. The court curtly distinguished *Dlamini*'s case (at 79) but it is by no means clear why the test of normal lifestyle should not have influenced the type of car which claimant was to be allowed.

[220] 1991 1 SA 756 (A).

[221] *Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 587. See too *Hughes v Santam Insurance* 1988 (W) (unreported 29.9.88 case 20704/86).

In *Ndlovu*'s case[222] the victim would in the normal course of events have owned a motor car. The cost of a more expensive vehicle was disallowed.

In *Shasha*'s case[223] the court declined to award extra transport costs on the grounds that compensation was to be awarded for modifying claimant's home and that she was expected to relocate to a position close to the facilities which she needed.

The money expended on a motor car is partly necessary and partly discretionary. A modest functional vehicle is generally quite adequate for most transport purposes. Anything more expensive may reflect considerations of status and/or luxury spending and is *prima facie* hedonistic. On the other hand some may say that to have a car at all is a luxury. Public transport and taxis are not generally available to persons who cannot walk.[224]

If a claimant is to be provided with more luxurious transport facilities then the award for general damages should be adjusted downwards.[225]

The injuries may justify the purchase of a car earlier than might otherwise have been the case.[226]

[12.11.2] Unlikely expenditure: Allowance was made in the *Dhlamini* case for the costs of an attendant notwithstanding that the claimant 'could not really grasp anything so remote and, to him undreamt of, as a personal attendant'.[227] This observation suggests that despite the award of compensation an attendant was highly unlikely ever to have been employed. No deduction was made for this contingency. A different set of reasoning might have allowed the cost of an attendant and a motor car and then made a substantial deduction for the substantial probability of non-use. The over-all compensation may then have been substantially the same.

[12.12] MODIFICATIONS TO THE HOME

[12.12.1] Leased premises: In *Dusterwald*'s case[228] a substantial sum was awarded for the costs of modifying the claimant's future residence to accommodate his disability and the installation and running of airconditioning. The costs of a heated swimming pool would also

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[222]*Ndlovu v Swaziland Royal Insurance* 1989 4 C&B E2-1 (Swazi) E2-9-10.

[223]*Shasha v President Insurance* 1990 4 C&B A2-8 (W).

[224]Amongst the lower-income groups where one taxi carries a number of persons the disabled are generally unwelcome due to the extra space and trouble required for their transport, particularly if they have a wheelchair. A telephone taxi service for disabled persons has been introduced in certain areas.

[225]*Ngubane v SATS* 1991 1 SA 756 (A) 786; *Administrator-General SWA v Kriel* 1988 3 SA 275 (A).

[226]*Hutchings v General Accident Insurance* 1986 3 C&B 737 (C); *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 79.

[227]*Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 578.

[228]*Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 86-9; in *Ndlovu v Swazi Royal Insurance* 1989 4 C&B E2-1 (Swazi) modifications were restricted to the bathroom only; in *Wessels v AA Onderlinge Assuransiempy* 1989 4 C&B A3-19 (T) a number of recommended modifications were disallowed; in *Bennie v Guardian National Insurance* 1989 4 C&B A3-34 (W) the costs of altering the family holiday flat were allowed.

have been awarded save that the evidence indicated that claimant had by the time of the trial not engaged much in swimming. In *Dhlamini*'s case[229] the court refused to award compensation for the costs of modifying the claimant's residence. The reason given was that claimant would not in the normal course of events have owned a home of his own. This reasoning is most unfortunate. The primary benefit of ownership is a right of occupation. That same right can be obtained by leasing premises. It is difficult to appreciate why a tenant should not be compensated for the costs of adapting the leased premises to his disability.[230] It would be going too far, however, to suggest that the costs should be allowed again and again every time the victim changed address. It is not unreasonable to expect a tenant who wishes to make expensive modifications to negotiate a lease which ensures a reasonably long-term tenure.[231] Alternatively one may observe that once endowed with lump-sum compensation money the victim is well able, and well advised, to purchase a home of his own, even if in the uninjured condition such ownership was unlikely. This latter consideration reflects an approach to assessment whereby regard is had for the effect of the award on the claimant's life plan.[232]

[12.12.2] Investment of award in a home: The application of compensation money to the purchase of a home may be criticised by those who insist that the victim must entirely consume interest and capital over a certain number of years. Such persons will point out that at the end of the victim's life the value of the home will not have been consumed. Such a view ignores the fact that the victim's actual date of demise is in no way determined by actuarial tables and that the prudent victim should save for a ripe old age just like every other prudent person.[233] For those who would in the normal course of events have applied earnings to purchase a home the application of compensation money to that purpose is merely fulfilling the normal life plan without the expense of bond repayments. For the victim who would not normally have purchased such a home one may point to the present value of that part of his earnings which would otherwise have been applied to paying rent. Ownership of a home, particularly for the more gregarious members of our society, can provide income from letting out rooms or retaining importance and a sense of belonging within the family group by providing a home for himself and other family members who would normally have rented.

[12.12.3] Compensating advantages: The claimant who effects expensive modifications to a home will usually at the same time enhance the value of his estate. Improvements such as large toilet areas and extra-wide passages are unlikely to enhance value, but airconditioning, tiling, electric garage doors, intercoms, security fences, flatlets for attendants, etc are of general value. For the higher-income victim such features may have been acquired even if there had been no injury. The enhanced value of the estate is a gain which is appropriately

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[229] *Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 587.

[230] This was done in *Hughes v Santam Insurance* 1988 (W) (unreported 29.9.88 case 20704/86).

[231] See Kerr 1991 *SALJ* 9-13.

[232] See formula B at 60.

[233] Persons of low income are unlikely to be able to save and must thus rely on the State pension which from September 1993 has been R4440 per year regardless of race.

deducted from the overall cost. In *Shasha*'s case[234] the court dealt with this problem by awarding the cost of renting suitable premises rather than the capital cost of outright purchase. In general the present capitalized value of a right of use is less than the cost of outright purchase. This relationship can be upset by the incidence of running and maintenance expenses. Electrical devices, particularly airconditioning, consume substantial amounts of electricity apart from maintenance costs and the costs of replacement. It is usual that running and maintenance costs are claimed separately from the initial capital outlay for providing suitable accommodation.

[12.13] ATTENDANTS

[12.13.1] Remuneration: More than one attendant may be needed, one to attend to the victim's person and the other to perform domestic chores. The cost of a fulltime attendant will be allowed even though the claimant can make do without one from time to time.[235] For live-in attendants free board and lodging is a valuable fringe benefit. It follows that where board and lodging is provided the cash benefits for the attendant should be reduced. For higher paid attendants it may be appropriate to provide pension and medical aid benefits. For lower paid attendants it would usually be adequate to rely on the state pension scheme and state hospital services. Where round-the-clock attendance is needed provision must be made for substitute attendants during holidays and periods of illness. The rates of pay for free-lance nurse-aids will usually include full allowance for board and lodging, pension and medical aid, benefits which self-employed persons normally have to provide for themselves.

[12.13.2] Regional and social diversity: Some reservations must be expressed that a victim who was earning R8000 per year would employ an attendant charging R18000 per year. It is more likely that a cheaper attendant would be employed fulltime with the more advanced skills being provided by district nurses and social workers subsidised by government. The allowance for expenses should be consistent with the social status and expected normal income level and lifestyle of the victim. Employment bureaus will tend to cater for affluent urban communities. Cash starved townships and rural communities, black and white, will be able to command domestic services at very much lower rates, particularly if travelling time to and from work is minimized.[236]

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[234]*Shasha v President Insurance* 1990 4 C&B A2-8 (W).

[235]*Sigournay v Gillbanks* 1960 2 SA 552 (A) 555sup-C; *Van Rensburg v AA Mutual Insurance* 1969 2 C&B 40 (E) 44-5. In *Ndlovu v Swazi Royal Insurance* 1989 4 C&B E2-1 (Swazi) the claim for the costs of an attendant was reduced because the attendant would only be needed on those occasions when claimant travelled away from his home.

[236]A survey of the cost of fulltime attendants for quadriplegics done by the occupational therapist Mrs M Fourie of Cape Town in August 1989 produced 15 replies. These indicated levels of remuneration ranging from R3360 per year to R9600 per year (R5000 to R15000 per year in 1992). These figures include benefits in kind such as board and lodging. It would be useful to have such statistics reported on a yearly basis.

The costs of employing an assistant in the work environment is of similar nature to the employment of an attendant[237] save that the need will usually cease upon normal retirement and may be subject to a deduction for taxation[238] because the expense is tax deductible.

[12.13.3] Accommodation and travel: If the victim were to go on holiday there would be additional transport and accommodation costs for the attendant. By not going on holiday the victim would save these costs. The compensation may thus be limited to the lesser of the costs and the general damages appropriate to not being able to go on holiday.[239] If the victim is to be awarded the costs of modifying his home to provide accommodation for the attendant then a deduction should be made for the associated enhancement to the value of the home.[240]

[12.13.4] General contingencies: Compensation will not be denied because the victim can manage from time to time without assistance.[241] The costs of an attendant will be allowed even if the wife and children are able to provide the necessary assistance.[242] This is correct in terms of utility theory. Even-handed justice then suggests that a contingency deduction should be made if the attendant will be doing work that would otherwise have been done by a part-time maid or family members. The victim may have required an attendant in later years in any event.[243] If the victim will now not marry and be spared the costs of supporting a wife then the value of this advantage, or the chance thereof, should be offset against the cost of an attendant. If the costs of the attendant will rank as a business expense then a deduction should be made for the tax advantage. In one instance the court allowed for the uncertainty attaching to the needed 'care person' by making no deduction for general contingencies from the actuarial value of loss of earnings, but otherwise making no explicit award.[244]

[12.13.5] Cars and wheelchairs: A driver-attendant may render unnecessary a specially modified car or a power attachment for a wheelchair.[245] Considerations of the victim's self-respect arising from maximum independence may suggest that he should nonetheless be awarded the cost of a special car and a power wheelchair. The general damages should then be suitably reduced and consideration should be given to whether the victim will refrain from

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[237]See, for instance, *Blyth v Van den Heever* 1980 1 SA 191 (A) 226; *President Insurance v Mathews* 1992 1 SA 1 (A).

[238]See 232.

[239]See footnote 196.

[240]See paragraph 12.12.3.

[241]*Sigournay v Gillbanks* 1960 2 SA 552 (A) 555B; *Van Rensburg v AA Mutual Insurance* 1969 2 C&B 40 (E) 44-5.

[242]*Fredericks v Union & SWA Insurance* 1972 2 C&B 335 (E).

[243]*Page v Rondalia Assurance* 1974 2 C&B 524 (E) 532. Contra *Mostert v Shield Insurance* 1978 2 C&B 751 (E) 752.

[244]*Nkomo v President Insurance* 1992 4 C&B A4-82 (W) A4-86inf.

[245]*Ndlovu v Swazi Royal Insurance* 1989 4 C&B E2-1 (Swazi).

incurring the expense. If the expense will not be incurred then it may be better to increase the general damages and abstain from explicitly awarding the costs.[246]

[12.13.6] Curator bonis: Brain damage may render a victim incapable of attending to his own financial affairs. For an adult victim the requirements of rule 57 of the Uniform Rules of Court must be satisfied. In such circumstances the ongoing costs of a *curator bonis* form part of the damages suffered.[247] The fees for a *curator bonis* are 6% of income collected and 2% of capital released.[248] If the award is assumed to be invested in interest-bearing rather than growth assets then the allowance for a *curator bonis* can be quite substantial, of the order of 10% to 20% of the award. In times of high inflation, however, it is reasonable to assume substantial investment in growth assets with little or no income accruals.[249] With growth assets the fees for a *curator* can amount to as little as 1% of the award. In *Carstens'* case[250] the award, including general damages, was increased by 5,63%. This judgment was handed down in the days when the fee on capital was still ½%. A modern court would probably award a higher percentage of the order of 7% to 7,5%.

It can be argued that allowance should also be made for the costs of providing security.[251] This expense can normally be avoided by appointing a reputable organisation as *curator*.[252] In some jurisdictions the master's office insists on the provision of security by all *curatores*. One may seriously question the reasonableness of such a procedure for *curatores* who have substantial assets of their own. The issue affects not only the direct cost of security but also the freedom with which the claimant can invest his funds and the resultant investment returns thereon. A low prospective investment return implies a substantial increase to the present capitalized value of future losses.[253] The combination of low rates of investment return coupled with costs for security and administration can increase an award by as much as 50% or more. A claim for the costs of security has been rejected.[254]

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[246]See footnote 196.

[247]*Marine & Trade Insurance v Katz* 1979 4 SA 961 (A) 985; *Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1029D-G; *Arnold v Teno* (1978) 83 DLR (3d) 609 (SCC) 635-6; *Reyneke v Mutual & Federal Insurance* 1992 2 SA 417 (T).

[248]Prior to 1 July 1991 the rate on release of capital was ½%. Since that date the rate on release of capital has been increased to 2% (s3(b) of R1602 of 1 July 1991 promulgated in terms of s103 of the Administration of Estates Act 66 of 1965).

[249]For example investment in a home for the victim would attract no income on which the *curator* may charge a fee. See 139.

[250]*Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1029D-G.

[251]A security bond normally insures against dishonesty and negligence but not against bad investment advice.

[252]A life policy with a large investment component is acceptable to certain masters without the need for the provision of security, provided it is underwritten by an acceptable life office.

[253]See 127.

[254]*Nkomo v President Insurance* 1992 4 C&B A4-82 (W) A4-87 'He is a senior and respected accountant and is clearly qualified for the task. The plaintiff has asked that the defendant be ordered to pay the costs relating to the furnishing of security by the curator. In the absence of the defendant's consent to such an order I am not prepared to grant it as I do not believe it proper and I can find no clear precedent for it'.

The formal appointment of a *curator bonis* is not something to be lightly undertaken. The *curator* will be subject to the scrutiny of the master's office with all the attendant frustrations[255] and potential restraints on investment. It is usually preferable that by agreement between the parties the money is paid into a trust *inter vivos* with an increase of 6% to the overall damages to allow for the present value of the future costs of administration. This procedure will also avert the need to provide expensive security. It can be argued that a claimant who refuses to agree to a trust and insists on the formal appointment of a *curator bonis* has failed to take reasonable steps to mitigate the damages.

[12.14] EXPENSES FOR A CHILD

[12.14.1] Future costs awarded to parent: When a father has paid for the medical or other expenses occasioned by an injury to his child he has his own right of action to recover these costs.[256] This is to be distinguished from the claim whereby he assists his child in bringing the child's right of action for damages.[257] The general practice in South Africa has been to award to the father in his own right not only past costs that he has met but also the present value of future *damnum emergens*. In some cases the award to the parent has been for the entire life of the child.[258] In other cases the award covers only the period until the child would otherwise have become self-supporting.[259] In one matter the court made the award directly to the child on the grounds that the parent did not have the means to incur the expenditure.[260] In *Kloppers'* case[261] the court expressed concern as to what would happen if the father died. In practice, provided there are assets, the child will have a right to claim support from the parent's estate.[262]

[12.14.2] Unjustifiable practice: The practice to make an award for future expenses to the parent is, strictly speaking, without justification. Once the child has received compensation the parent's duty to incur the expenses falls away.[263] In general a child cannot be called upon to apply capital to meet the cost of support. This rule, however, does not apply to

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[255]Such as quotations in triplicate before money will be released and restrictions on the range of permissible investments.

[256]*Schnellen v Rondalia Assurance* 1969 1 SA 31 (W).

[257]McKerron 'Delict' 7ed 83sup.

[258]*Rondalia Assurance v Gonya* 1973 2 SA 550 (A) 553E-F 555-6.

[259]*Kloppers v Rondalia Assurance* 1972 2 C&B 289 (W) 295-6.

[260]*Ncubu v NEG Insurance* 1988 2 SA 190 (N) (quite apart from low earnings the parent's claim had prescribed); see too *Mashini v Senator Insurance* 1979 3 C&B 82 (W) 91.

[261]*Kloppers v Rondalia Assurance* 1972 2 C&B 289 (W) 295-6.

[262]*Glazer v Glazer* 1963 4 SA 694 (A) 699; Spiro 'Parent & Child' 3ed 365-6; Boberg 'Persons & family' 279-89.

[263]*Mashini v Senator Insurance* 1979 3 C&B 82 (W) 91 'It will be in the interests of the child to award the damages in respect of such items to the plaintiff in his capacity as father and natural guardian of the child. No injustice will be done to the father by such a course, because the expenses concerned will not have to be paid out of the father's pocket, but will be payable out of the child's funds - a child who has the means to support himself cannot require his parents to do so'.

compensation money.[264] In *Van Gool*'s case[265] it was emphasised that there is no rule that only the parent may claim for such expenses. It is to be hoped that in future there will be an increasing tendency to claim all future expenses in the child's name alone.

[12.14.3] Apportionment of damages: If the child has been contributorily negligent and the award is for this reason reduced a parent will, in theory, need to meet the balance of the cost himself. There is some justification in such circumstances for allowing a claim to the parent for the future expenses of the child to the extent that these have been apportioned against the child.[266]

[12.15] GENERAL DAMAGES

[12.15.1] Balancing item: Medical treatment, assisting devices and attendants serve to relieve the effects of a disability, to restore to some degree the lost bodily functions. Perfect restoration is not possible and it is thus appropriate to make an award for such pain and suffering and loss of the amenities of life which cannot be made good by the award for necessary expenditure. The award of general damages is, in this sense, a balancing item which serves to top up the victim's present utility to its pre-injury level.[267] The notion of 'topping up' calls to mind a bucket the contents of which have been diminished by the wrongful act.[268] The contents are not legal rights and duties, nor assets, nor money, but a bucket of utility. This topping up is done on an objective basis[269] having regard to previous awards[270] and sometimes to the overall state of the country's economy.[271] Nonetheless it follows from the notion of topping up that the more comprehensive the range of devices and services for which explicit allowance has been made, the smaller should be the award for general damages.[272]

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[264] *Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A) 612-13; *Mashini v Senator Insurance* 1979 3 C&B 82 (W) 91. In *Kloppers v Rondalia Assurance* 1972 2 C&B 289 (W) 296 the court indicated that R5000 of the child's general damages should be applied to relieving the burden of blindness during the years of dependency. See too *Reyneke v Mutual & Federal Insurance* 1991 3 SA 412 (W) 428-9.

[265] *Van Gool v Guardian National Insurance* 1992 1 SA 191 (W); 1992 *THRHR* 480.

[266] In *South British Insurance v Smit* 1962 3 SA 826 (A) 838B the child's damages had been reduced for contributory negligence. The damages awarded to the father included allowance for future expenditure and were not reduced for contributory negligence.

[267] Visser 1983 *THRHR* 43 49 'Die kern van skadevergoeding is tog die invloed wat 'n geldbedrag op die skade het sodat die skade beperk of uitgewis word. Alhoewel dit nie dikwels so gestel word nie, is dit 'n logiese oogmerk van kompensasie dat die geld wat die eiser ontvang hom teoreties in staat moet stel om die aangetaste belang weer in sy oorspronklike potensiaal te herstel of te vervang'.

[268] Bloembergen '*Schadevergoeding*' 115 uses the analogy of topping up a bucket of water. Van der Walt 'Sommeskadeleer' 145n61 'sy plastiese beeld'.

[269] Boberg 'Delict' 552; Corbett & Buchanan 3ed 8-9.

[270] Corbett & Buchanan 3ed 7; Boberg 'Delict' 572-3; *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A).

[271] Visser 1986 *De Jure* 207 216-17; Corbett & Buchanan 3ed 6; *Shephard v Zimnat Insurance* 1984 3 C&B 532 (Z) 535.

[272] See footnote 196.

[12.15.2] Core element: General damages comprise a core element related to the nature of the injuries in general and a more subjective discretionary portion which serves to increase the victim's hedonistic spending capacity. One would expect that the discretionary element will not be awarded to persons who have not the capacity to take advantage of increased discretionary expenditure.[273] Where explicit allowance has been made for an extremely wide range of compensatory devices and services it is conceivable that the general damages will contain little or no hedonistic element, that is to say will be at much the same level as for an unconscious[274] or dead[275] victim.

[12.15.3] Functional approach: If general damages were concerned solely with what the victim can do with the money, the so-called 'functional approach', then the award for general damages would be wholly displaced by a comprehensive award for the future costs of devices and services. We know that general damages are awarded to the unconscious[276] and to the estate of the dead.[277] It follows that the level of general damages is not determined solely by functional considerations.[278] However, the court should at least have in mind a purpose when making the award.[279] In *Du Bois*'s case[280] the damages payable to the estate of a paraplegic claimant who died 5½ years after the accident had regard to the period that she had lived and borne her discomfort but not to her expectation of life. The award was conservatively assessed bearing in mind that only her heirs would actually benefit from the award.

[12.15.4] Freedom from the need to work: A man who has chosen not to work or who works for no salary cannot expect to be compensated for a loss of earnings. His general

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[273] *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 305-6; *Roberts v Northern Assurance* 1964 4 SA 531 (D) 537G-H; *Dyssel v Shield Insurance* 1982 3 SA 1084 (C) 1086A-G. Contra *Gerke v Parity Insurance* 1966 3 SA 484 (W) 495B 'If a man remains unconscious for ten years after the injury his claim for total loss of earnings cannot be disputed. The fact that he is unaware of his loss is irrelevant and, by the same standard, unawareness of the loss of amenities should not be a bar to compensation' (the victim in the *Gerke* case was a married man who owed a duty of support to his family). In *Reyneke v Mutual & Federal Insurance* 1991 3 SA 412 (W) 428-9 the court considered what use could be made of general damages to alleviate the unconscious victim's condition.

[274] *Gerke v Parity Insurance* 1966 3 SA 484 (W); *Reyneke v Mutual & Federal Insurance* 1991 3 SA 412 (W).

[275] *Potgieter v Rondalia Assurance* 1970 1 SA 705 (N); *Potgieter v Sustein (Edms) Bpk* 1990 2 SA 15 (T).

[276] *Gerke v Parity Insurance* 1966 3 SA 484 (W); *Reyneke v Mutual & Federal Insurance* 1991 3 SA 412 (W). Reinecke 1976 *TSAR* 26 28n26 is critical of the ruling in *Gerke*'s case.

[277] *Potgieter v Rondalia Assurance* 1970 1 SA 705 (N); *Potgieter v Sustein (Edms) Bpk* 1990 2 SA 15 (T).

[278] *Southern Insurance v Bailey* 1984 1 SA 98 (A) 117-20 rejected the contention that a functional approach should be applied to the determination of general damages 'This does not mean, of course, that the function to be served by an award of damages should be excluded from consideration. That is something which may be taken into account together with all the other circumstances'.

[279] Visser 1986 *De Jure* 207 212 'Veral van belang is die doel waarmee 'n bepaalde bedrag toegeken word, byvoorbeeld die feit dat die bedrag as teenwig vir die ongelukkigheid wat die eiser ervaar het, moet dien, of dat dit... as psigiese bevrediging (genoegdoening) moet dien vir die onreg wat hom aangedoen is'; Visser 1988 *THRHR* 468 490inf 'Uit die praktyk in verband met die aksie weens pyn en lyding is dit baie duidelik dat dit geen primêre genoegdoeningsfunksie het of behoort te hê nie'; see too Visser 1983 *THRHR* 43 46 59-60. See too *Reyneke v Mutual & Federal Insurance* 1991 3 SA 412 (W) 428-9.

[280] *Du Bois v Motor Vehicle Accident Fund* 1992 4 SA 368 (T).

damages may include a substantial amount for loss of work capacity, but that is not compensation for patrimonial loss. Typical of the non-worker would be the millionaire who has no need to work. Typical of the non-salaried worker would be a housewife who provides her services free of charge as a social-welfare worker. Many people in receipt of a lump sum provided by insurance or damages would be tempted to become non-workers or workers without financial gain. Wealth[281] relieves the possessor from the drudgery of earning a living.

The South African courts are remarkably silent about the non-patrimonial advantages of a lump-sum award. The financial advantage is introduced by way of the discounts for interest and for risk. But what of the elimination of the need to work? A large award is the ultimate insurance against the hazards and stresses of earning a living.[282] The tragic condition of the victim cannot be overlooked. It is the price he pays for the lump-sum. But sudden wealth and all its attendant opportunities in terms of lifestyle cannot be ignored if the award is to be fair to both plaintiff and defendant. The matter has received judicial consideration in Australia in the following terms:[283]

> 'The psychic gain, if any, from being relieved of the anxiety of obtaining and retaining employment is more than offset by the plaintiff's frustration at being unable to support himself by his own exertions and the loss of enjoyment of being a useful member of society'.

Hall records that:[284]

> 'In a society that values work and that uses occupation as a source of identity as well as of support, not having a job is a stigma that symbolizes a loss of role, purpose and meaning. ... Even when unemployment insurance or old-age pensions provide material security, as in some countries, this meeting of material needs has been found to be insufficient for self-esteem and public recognition'

Luntz,[285] however, remains of the view that some allowance should be made for the advantages of no longer having to work for a living. The following passage, unrelated to the assessment of damages, puts the case for the disutility of work:

> 'Work, in more ways than one, is central to our existence. Very few people work for work's sake. It is only the fortunate few who find that the job is its own reward,

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[281]Including compensation for a total loss of earnings (Atiyah 'Accidents Compensation & the Law' 3ed 190).

[282]The utility of a lump sum will vary widely for different claimants, depending on the previous wealth of the victim and his desire to change social status. See Friedman & Savage 1948 *JPE* 279 299.

[283]Luntz 'Damages' 2ed 53-4.

[284]Hall 'Career development in organisations' 107 113.

[285]See previous footnote.

> and few who derive real satisfaction and pleasure from what they do. For many people, work is dull, repetitive, exhausting or downright unpleasant'.[286]

The crucial issue is the extent to which the award of a large sum of money will enable the victim to establish a new identity, a new and meaningful role in society. A relevant question in this regard is the extent to which uninjured persons continue to work after winning a large lottery prize, or inheriting a vast estate.

The adjustments made for general contingencies tend to be deductions.[287] The psychic advantages of a lump sum are arguably one of the factors giving rise to this phenomenon.[288]

[12.15.5] Retributive awards: The award of general damages to the unconscious and the dead is difficult to distinguish from punitive damages.[289] The main beneficiaries will be the victim's family and heirs,[290] what in the old germanic law were known as the *sib*.[291] In older times the *sib* had the right to take revenge for the injury or the death.[292] The wrongdoer could 'buy off the spear or bear it'.[293] The award for damages, general and patrimonial, served to buy off the spear. In modern times the *sib* no longer has this right, the criminal law now fulfils this function.[294] The award of general damages to the unconscious or deceased victim is thus today something of an anachronism, a legal dinosaur that has survived despite the demise of its original purpose.[295] To describe it as punitive is generally incorrect because it will only effect punishment if the wrongdoer is not insured and is personally liable for the damages. If the award achieves anything at all it enriches the victim's *sib* and makes good their sense of a need for revenge. In this sense the award is

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[286]Levy 'Rights at work' 1. Hahlo 'Husband & wife' 5ed 'Unless he happens to be one of the fortunate few who can support their families adequately out of capital he has to submit to the painful necessity of having to work for a living'.

[287]See 157.

[288]Boberg 'Delict' 599 quotes Fleming's observation as to the 'unspecified extra satisfaction' that derives from receiving a large sum of money.

[289]Boberg 'Delict' 570 echoes the punitive tone when he writes 'This solution... enables the law to express society's sympathy with the victim and its sense of outrage at his grievous loss'. The 'solution', however, does nothing to relieve the victim's condition'.

[290]*Gerke v Parity Insurance* 1966 3 SA 484 (W) 495H 'The artificial nature of such a claim, which bestows a benefit upon an heir for something which could never have belonged to him even by inheritance, and that is the enjoyment of his personal life by another'. The court is here clearly uneasy about the award to be made. The unsoundness of the English line of reasoning was subsequently demonstrated when the House of Lords requested legislation to remedy an impasse of their own making (*Gammell v Wilson* [1981] 1 All ER 557 (HL) 574).

[291]The *sib* comprised the victim's close family as well as more distant blood relatives. Up to seven divisions were recognized (Davel 'Skadevergoeding' 17-18).

[292]The *sib* also had the right to receive compensation. This right was matched with an obligation to meet the cost of compensation for the wrong of a fellow sibling (Davel 'Skadevergoeding' 16-17).

[293]Hahlo & Kahn 'SA Legal System' 352-3; Davel 'Broodwinner' 46-55.

[294]Davel 'Skadevergoeding' 19.

[295]Visser 1986 *De Jure* 207 208 'Toekennings vir pyn en leed is aanvanklik as geldboetes ingeklee'.

neither compensation nor punishment but retribution. It is difficult to reconcile such awards, based on a technical point of law, with the non-award of general damages to the family of a victim who is killed instantly.[296]

[12.15.6] Financially relevant awards: The victim is always free to refrain from incurring an expenditure for which the court has made allowance in its calculations. If the compensation related to that expenditure has exceeded the general damages which would otherwise be awarded then by avoiding the expenditure the victim will succeed in increasing his compensation above that which would have been awarded had there been an award for general damages alone.[297] The lower amount by way of general damages is appropriately viewed as the value of the chance that the expense will be incurred. Where expenses are so necessary that the victim is unlikely to forego the benefit thereof then this problem does not arise and it remains appropriate to award to the victim the value of the expected expenditure even if this does exceed the general damages otherwise payable.[298] An example of the former is when a man chooses to live with his scarring and keeps the money allowed for the cost of a plastic surgeon.[299] Likewise, a victim may take advantage of low-cost state medical services and keep the money allowed for private medical care. Should the damages be limited to the relevant general damages?[300] Reasoning along these lines will not produce workable results if the awards for general damages are too low.[301] This consideration suggests that awards for general damages cannot be determined without some regard for general price levels and available skills and technology. This double-check on the level of awards would be additional to that of comparing awards in comparable earlier cases, if such can be found. However imprecise such bench-marks might be they are not wholly indeterminate. Awards of general damages 'are not made in a vacuum'.[302]

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[296]See 273. Modern concepts of justice would seem to favour the introduction of a statutory dependants' solatium (see footnote 5 at 274). There is much to be said for replacing the Assessment of Damages Act 9 of 1969 with a Dependants' Solatium Act (see footnote 5 at 345).

[297]*Light v Conroy* 1948 1 C&B 444 (T) 445 (quoted in footnote 196). With loss of earnings compensation for the 'lost years' is likewise limited to general damages (*Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A); *Venter v Federated Employers Assuransiempy* 1978 2 C&B 756 (T) 759p2).

[298]Van der Walt 'Sommeskadeleer' 158 'Die BGB skryf naamlik geld as skadevergoeding voor waar daadwerklike herstel buitensporig duur sal wees'.

[299]*Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 582.

[300]Despite an earlier reference to *Light v Conroy* 1948 1 C&B 444 (T) the court in *Dhlamini v Government of RSA* 1985 3 C&B 554 (W) 586 went on to rule that the victim could have compensation for medical expenses on the basis of private treatment. See footnote 196.

[301]Newdigate & Honey 'The MVA Handbook' 150 suggest a method for predicting general damages awards from past awards. Their basis is a flat, ie non-compound rate, of 5% per year up to 1972 and 10% per year thereafter. The average flat rate of inflation between 1947 and 1972 was 6% per year (3,8% per year compound); between 1973 and 1989 the average flat rate has been 42% per year (13,6% per year compound). If the suggested basis is correct then awards for general damages are declining rapidly in terms of real buying power.

[302]Boberg 'Delict' 573. *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A). Contra *Mutual & Federal Insurance v Swanepoel* 1988 2 SA 1 (A) 11-12.

In certain circumstances the award for general damages will include allowance not only for discretionary expenditure but also the value of lost earning capacity.[303] Earning capacity will only be compensated to the extent that the victim has the prospect, now injured, of incurring living expenses, either necessary or hedonistic.[304]

[12.15.7] Objectively observed subjectivity: It has been said that 'subjective considerations' influence the award for general damages.[305] Awards are not made in a vacuum.[306] The judge does not act in an entirely arbitrary manner when making an award for general damages. There is nonetheless an element of judicial subjectivity, in the sense of the exercise of judgment, but that feature is not peculiar to awards for general damages alone. The 'subjective considerations' which are peculiar to the award of general damages are the mental and physical responses of the victim to his injuries. These are, however, substantially objectivized in the sense that the subjective element is only taken into account in so far as it is observed by the court and allowed recognition by our fellow men. The fact that a victim personally considers his award inadequate is not relevant.[307] The award will be determined without regard for the utility of money to the victim,[308] a consideration that substantially depersonalises the award and lends to it an objective quality. The award will have regard to the intensity of deprivation or suffering and the duration thereof.[309]

[12.15.8] Enrichment of the life plan: The hedonistic element of general damages is directed at providing the victim with unallocated discretionary expenditure by which to offset his condition. This does not mean to say that the expenditure is to be applied explicitly to relieving the disability.[310] It is also to be utilised for enriching the victim's life plan in some way chosen by the victim. Such enrichment may take the form of overseas travel, a new car, savings, or any other pleasurable application of spending power in the fulfilment of a life plan. Buying power is fundamental to the adequacy of the award. It follows that

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[303]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 112-13. See too footnotes 178 and 179 at 63.

[304]*Roberts v Northern Assurance* 1964 4 SA 531 (D) 537G-H; *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 305-6.

[305]Visser 1981 *De Rebus* 438 438-9; Visser 1983 *THRHR* 43 58-9.

[306]See footnote 302.

[307]Visser 1983 *THRHR* 43 56.

[308]*Radebe v Hough* 1949 1 SA 380 (A). Corbett & Buchanan 3ed 8n64 note that the courts have not been astute to abide by this directive. More generally see Visser 1986 *De Jure* 207 211-12.

[309]Visser 1986 *De Jure* 207 210. Bentham's first 2 measures of utility are intensity and duration to which he adds certainty, propinquity, fecundity, purity and extent (Page 'Utility Theory' 33; see 31 above). The English courts determine loss of earning capacity or support by reference to annual loss, the multiplicand (intensity), and duration, the multiplier which includes allowance for contingencies (see Koch 'Damages' 48 49).

[310]As was suggested by the court in *Kloppers v Rondalia Assurance* 1972 2 C&B 289 (W) 295-6 (R5000 to be applied during childhood to ameliorate the effects of blindness); see too *Reyneke v Mutual & Federal Insurance* 1991 3 SA 412 (W) 428-9. For further examples see Visser 1983 *THRHR* 43 56.

the hedonistic element of general damages should have regard to the general cost of goods and services in the community at large.[311]

[12.15.9] Eclectic assessment criteria: The assessment of general damages is eclectic as regards its theoretical basis. The award will usually comprise a core element of a non-patrimonial retributive character supplemented by a flexible hedonistic component of patrimonial character.[312] This patrimonial character is to be distinguished from patrimonial loss in its more usual sense in that it is awarded with little or no regard for any explicit income or expenditure. The dividing line between patrimonial and non-patrimonial is ill-defined save that the non-patrimonial core element may be clearly distinguished. Visser defines non-patrimonial loss as an interference with personal rights that do not affect his economic position.[313] This seems incorrect because the loss of a leg or damage to a head will usually affect both earnings (patrimonial) and quality of life (non-patrimonial). A satisfactory definition of non-patrimonial loss is difficult to devise because of the general overlap and interaction between patrimonial and non-patrimonial.

[12.16] FLUCTUATING EARNINGS

The earnings of self-employed persons and those earning commission or overtime may fluctuate quite widely. In order to project subsequent notional earnings it is necessary to take out an average of earnings prior to the injury. This would ideally be done over a period of 3 or more years. Under conditions of high inflation an adjustment must be made to the average to allow for the fact that the buying power of a rand earned say 3 years ago is not the same as that of the rand earned today. The procedure is illustrated by the following example:[314]

If averaging were done without allowance for inflation then the level of earnings used for input to the actuarial calculation would be too low, R84250 per year compared to the properly adjusted figure of R102425 per year.

[12.17] BUSINESS CAPITAL

[12.17.1] Earning capacity of capital: The self-employed businessman commonly uses business capital in conjunction with his work capacity in order to generate earnings. When such a person is seriously injured he may immediately sell off the business assets and invest the proceeds. Capital properly invested will generate income independently of the work capacity of the owner. The loss of earnings is the difference between earnings but for the injury and the investment income. If the business is making losses the duty to mitigate may require that he sell or close down the business. Business profits, we may observe, derive only partly from work capacity, the balance being attributable to the ongoing 'earning

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[311]Awards 'are not made in a vacuum' (see 259). See too *Beverley v Mutual & Federal Insurance* 1988 2 SA 267 (D) 271; *SA Eagle Insurance v Hartley* 1990 4 SA 833 (A). The ruling in *Everson v Allianz Insurance* 1989 2 SA 173 (C) was, from a utility point of view, the same principle as in the *Beverley* case.

[312]See paragraph 12.15.2.

[313]Visser 1983 *THRHR* 43 52-3; 1986 *De Jure* 207 209n7 'wat nie sy ekonomiese posisie raak nie'.

[314]Levin 'Statistics' 2ed 612-43 (note example at 633 and elimination from calculation of the highest and lowest values to minimize the effect of aberrant events). See too Koch 'Damages' 146; *Nochomowitz v Santam Insurance* 1972 3 SA 640 (A) 645-6; *Milns v Protea Assurance* 1978 3 SA 1006 (C) 1011C-D.

TABLE 17 - FLUCTUATING EARNINGS

Year Ending February	Nominal Income R py	Inflation Factor	Real Income 1990 rand values
1987	75000	1,509	113175
1988	66000	1,300	85800
1989	95000	1,155	109725
1990	101000	1,000	101000
Average	**84250**		**102425**

capacity' of the business capital.[315] The earning capacity of the man is, in this sense, a major capital asset in the business which will be damaged if the man is seriously injured.

[12.17.2] Declining real values (table 18): Consider a business where nothing is ploughed back towards maintaining business capital reserves. Although nominal asset values may be maintained analysis of the financial statements will reveal an ongoing decline in the real value of business assets. Such a business will in due course consume all capital. The contribution of business capital to profits can be analyzed in the manner shown in table 18.

Column A reflects actual asset values at the end of each financial year. Column B shows accounting profits taken from the financial statements. Columns C and F show earnings and capital adjusted to common rand values as at August 1989. Different inflation factors have been applied to profits as to assets since the assets reflect rand values at the end of each financial year whereas profits are assumed to have been earned continuously through the year and are on average relevant to a time half-way through the financial year.[316] Column D shows the reduction in value of capital in real terms in each year. Column E shows the notional investment return at 2,5% per year on average capital utilised during the year.[317] The last column G shows that part of profits which is attributable to the work capacity of the proprietor of the business. It is noticeable that the average earnings from this column (R73159 per year) is substantially lower than for the averages from columns B (R84250 per year) and F (R102425 per year).

[12.17.3] Real values maintained (table 19): An alternative business scenario would be one where the value of business assets increases in line with inflation. The contribution by

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[315]Passing reference to the distinction between capital and labour is to be found in *Van Staden v President Versekeringsmpy* 1990 4 C&B L2-1 (W) L2-13.

[316]The assumption is not generally appropriate to farming income from crops which is concentrated just after the harvest.

[317]ie on the average of capital at the beginning and end of each year.

TABLE 18 - BUSINESS CAPITAL DECLINES AT 4% PER YEAR

YrEnd Feb	Nominal Rands Capital A	Income B	1990 Rands Capital C	Reduction D	2,5%py E	1990 Rands Income F	F-D-E G
1986	124800	-	202925	-	-	-	-
1987	120000	75000	167760	35165	4634	113175	73376
1988	115384	66000	141577	26183	3867	85800	55750
1989	110946	95000	119933	21644	3269	109725	84812
1990	106679	101000	100385	19548	2754	101000	78698
Average		**84250**				**102425**	**73159**

TABLE 19 - BUSINESS CAPITAL MAINTAINED IN REAL TERMS

YrEnd Feb	Nominal Rands Capital A	Income B	1990 Rands Capital C	Reduction D	2,5%py E	1990 Rands Income F	F-D-E G
1986	103173	-	167760	-	-	-	-
1987	120000	75000	167760	-	4194	113175	108981
1988	136724	66000	167760	-	4194	85800	81606
1989	155190	95000	167760	-	4194	109725	105531
1990	178278	101000	167760	-	4194	101000	96806
Average		**84250**				**102425**	**98231**

TABLE 20 - BUSINESS CAPITAL INCREASING IN REAL TERMS

YrEnd Feb	Nominal Rands Capital A	Income B	1990 Rands Capital C	Increase D	2,5%py E	1990 Rands Income F	F+D-E G
1986	97333	-	158263	-	-	-	-
1987	120000	75000	167760	9497	4194	113175	118478
1988	144927	66000	177825	10065	4446	85800	91419
1989	174371	95000	188495	10670	4712	109725	115683
1990	212332	101000	199804	11309	4995	101000	107314
Average		**84250**				**102425**	**108224**

capital to business profits is the real rate of return, eg 2,5% per year, on business assets used during the financial year. In order to maintain the real value of capital assets it will usually be necessary to plough back part of business profits. Because the underlying asset values increase in line with inflation the same will happen to the earning capacity of such assets measured by a real rate of return of say 2,5% per year. Table 19 illustrates such a scenario.

The features to be noted in table 19 are nil values under column D for reductions in capital values, and under column E a constant real contribution of R4194 per year by capital towards business profits. This analysis indicates that a proper basis for assessing loss of earnings is R98231 per year.

[12.17.4] Increasing real capital (table 20): In many businesses the value of capital will increase at rates above the rate of inflation. This may arise due to a judicious choice of assets, for example business-owned office premises or a farm, or by reason of a high rate of plough-back of profits and re-investment of capital. Increases in capital values above the normal earning capacity of the capital are properly attributed to the skill, the earning capacity of the man in the choice and care of the assets. The earning capacity of the assets, measured at 2,5% per year, say, will increase faster than the rate of inflation. Table 20 illustrates this point.

The capital values in table 20 increase in real terms by the amounts indicated under column D. The scenario illustrates a business in which a substantial proportion of profits is being ploughed back, ie saved.[318] Under column E the notional real rate of return on capital grows faster than the rate of inflation, that is to say increases in real terms. The proper basis for assessing a loss of earnings in this instance is R108224 per year.

[12.17.5] Wealth reduces need to work: Once the profits of a man's work capacity have been capitalized by plough-back they then become part of the business capital available to cushion his loss of income should he be severely injured. For many persons who consistently increase their capital, that is generate savings, there will come a time when the accumulated assets are sufficient to remove the need to work. If work has a negative utility and will thus be avoided if circumstances permit then this reduced need may be manifested by reduced work effort or total retirement. Conversely one finds persons for whom the accumulation of money, and the associated power, is an end in itself. Such persons will probably not reduce work effort when wealth increases.

[12.17.6] The entrepreneur: The investment expert or entrepreneur may generate very little earnings by way of income in the general sense. The application of his work capacity will instead generate substantial capital gains, generally tax-free. The earning capacity of such persons should be measured by the extent to which the increase in asset values in a year exceeds the basic potential investment return of say 16% per year.[319] Earnings of this nature are probably subject to a very much higher risk of fluctuation, including loss situations, and should be subject to a suitably increased deduction for general contingencies. If the accumulation of capital is unusually rapid a further increase in the deduction may be appropriate to allow for reduction in future work effort and/or total retirement many years before age 65. The claimant's background may indicate, however, a likelihood of continuing accumulation of wealth throughout life to well beyond age 65.

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[318] A rate of ploughback of 6% per year over and above the rate of inflation.

[319] See paragraph 8.1.9.

[12.17.7] Investment capacity of victim: A victim who has received compensation may have the skill to generate investment returns well in excess of the average returns generally available.[320] The rates of investment return generally available should be understood to be net of the costs of managing the investment and obtaining investment advice. The excess returns are a form of residual earning capacity which serves to reduce the overall loss suffered.[321] Conversely a victim's condition may be such that he cannot manage even the simplest finances. In such cases he will be compensated for the costs of a *curator bonis*.[322]

[12.18] SERVICES OF WIFE IN A FAMILY BUSINESS

[12.18.1] Cost of substitute services: In many family businesses the husband is assisted by his wife who receives little or no wage for her services. If she ceases to assist in the business it is then necessary to employ someone and pay a salary at the full commercial rate for the services. The income attributable to the husband's work capacity is the total income from the business less the value of the wife's contribution and, if appropriate, less a further adjustment for the use of assets.

[12.18.2] Who claims for what?: The traditional view is that if the wife is injured and prevented by her injuries from working in the family business then the husband is entitled to claim for the cost of replacing her services[323] notwithstanding that it is the wife who has suffered the loss of work capacity.[324] If the husband has replaced the wife's services by himself working harder and longer hours it is unlikely that he will receive compensation. This unsatisfactory result flows from the judicial tendency to focus on actual cash outlay or shortfalls. Considerations of utility suggest, however, that the husband has suffered a loss of utility by reason of his efforts and should be compensated for the value of this loss.[325] A husband who has not suffered physical or psychological injury cannot claim general damages for inconvenience.[326] If the wife's injuries will in future prevent her from assisting in the business then it can be argued that she is to be compensated in her own right for the cost of providing substitute services. On the other hand it is the husband who must meet the cost of substitute services. Provided he has a right to demand that his wife provides substitute services there can be no major objection to compensating the wife for the future loss.[327] After all it is she who has suffered the injury. In years to come she may in any

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[320]Opportunities may be better in capital starved communities such as the black townships where excellent returns seem to be possible from owning a taxi or home-based grocery store ('spasa' shop).

[321]In practice it may be extremely difficult to prove the existence of an above-average ability to generate earnings from the use of capital. This is particularly true of a salaried person who has not previously had the benefit of substantial capital and therefore has no track record.

[322]*Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1029D-G.

[323]or the profits lost through not having her services available.

[324]*Plotkin v Western Assurance* 1955 2 SA 385 (W).

[325]Bloembergen '*Schadevergoeding*' 107-8 writes of the surgeon who has treated his own wounds.

[326]*Bester v Commercial Union Versekeringsmpy* 1973 1 SA 769 (A).

[327]*Erdmann v Santam Insurance* 1985 3 SA 402 (C) 409E.

event have ceased to render her services in the family business and gone out to take employment for a cash income.[328]

[12.18.3] Adjustment for income tax: The cost of providing substitute services will be tax deductible. The compensation should thus be reduced for the saving by way of tax liability. This is a benefit which is *prima facie* enjoyed by the husband but not the wife. However, if we look at the problem from the collective viewpoint of the family unit the benefit of the income *net after tax* from the family business is enjoyed by all. If the wife were to be compensated for the gross cost of hiring a substitute without a deduction for taxation the family as a whole would be better off. By reason of the tax advantage the husband will be able to provide a higher level of support to his wife. In this sense the wife does indirectly benefit from the tax advantage. If the wife were to go out to work outside the family business her income would be subject to taxation. It seems correct that an adjustment is made for taxation. The rate of tax to be applied will depend on the manner in which the wife was expected to utilise her work capacity.

[12.18.4] Injury to the husband: If the husband is injured, but not his wife, then his loss of earnings is the full income from the business suitably abated for the value of the wife's services and the contribution from business capital, if any. Such an approach presumes that the family business is immediately closed down or sold as a result of his injury and that the wife immediately takes alternative employment elsewhere.

There are instances where the wife has successfully taken over the running of the family business.[329] The support she provides to her husband and children from such income would be rendered in terms of her duty to do so. The support she provides is not gratuitous and should thus be deducted from the husband's loss of earnings. The wife has a claim in her own right for the increased cost to herself of supporting the family during her husband's disability.[330] In practice a court will probably ignore such fine points of law and treat the wife's increased contribution as *res inter alios acta*.[331]

But what if the wife cannot find employment elsewhere? The family then loses the income of both husband and wife. We know that dependants cannot claim for loss of support while their breadwinner is alive because his action is not for what he needs for himself alone but extends to his dependants as well.[332] This suggests that the injured husband may claim for the total loss of support suffered by the family.[333] A deduction should then be made for

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[328]See, for instance, *Williams v British America Assurance* 1962 2 PH J18 (SR).

[329]*Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A) pages 272-3 of the bundle for appeal; *Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 727A.

[330]*Schnellen v Rondalia Assurance* 1969 1 SA 31 (W).

[331]As happens with death claims (*Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A)).

[332]*De Vaal v Messing* 1938 TPD 34; *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 305; Bloembergen '*Schadevergoeding*' 79. In *Commercial Union Assurance v Stanley* 1973 1 SA 699 (A) compensation was awarded for loss of the financial benefits of marriage, ie loss of support occasioned by an injury.

[333]Bearing in mind that the income from the family business generally accrues to the husband there would probably be little difficulty with persuading a court to award compensation on this basis.

the value of the chance that the uninjured wife may find employment. A further deduction would be made for the chance that the injured husband finds alternative employment.

Popular notions that compensation is for 'loss of earning capacity' in the narrow sense do not permit a solution for the permutations described in the previous paragraph. The above analysis suggests that the action for personal injury is best viewed as a group action[334] whereby the breadwinner acts not only for himself but also for those dependent on him.

[12.19] ILLEGAL EARNINGS

[12.19.1] Compensation denied: A victim will be denied compensation if the earnings which he claims to have lost would have been derived from an illegal or immoral activity.[335] The illegality taints not only the earnings but also support derived from those earnings.[336] Dependants will thus be denied compensation by reason of the illegal conduct whereby their breadwinner earned his living.[337]

[12.19.2] Inadmissible evidence: One possible explanation for the illegality rule is that the wrongful manner in which income was earned renders evidence thereof inadmissible in court. Such an explanation must, however, be rejected if one bears in mind that evidence of illegal earnings may be led to establish earning capacity under conditions of legality.[338] This means that the entire claim need not be defeated because at the time of the injury or death there was involvement in an illegal activity. The defendant who wishes to avoid liability must establish not only that the earnings were illegal at the time of the injury or death but also that such illegality would have persisted throughout the period of the claim. A court is competent to make an award for the value of the chance of legality.[339]

[12.19.3] Tenuous earnings: The nature of an illegal activity may suggest that it could not have continued for very long and that for this reason compensation should be denied. This would certainly not explain the illegality rule. In the first place there are many illegal activities which continue for many years. Secondly a person who is prevented from earning his living illegally is likely to turn to some other activity, legal or illegal. The illegality rule is clearly directed at denying compensation for the loss of earnings or support derived from

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[334]See section 11.4.

[335]*Dhlamini v Protea Assurance* 1974 4 SA 906 (A); Boberg 'Delict' 588-94; Davel 'Skadevergoeding' 53-8.

[336]*Santam Insurance v Ferguson* 1985 4 SA 843 (A) 851F-G. See too 342 below.

[337]When interpreting judgments concerning illegality it should be borne in mind that a number of the anomalies are due more to poor trial preparation rather than deficiencies in the law. See, for instance, *Santam Insurance v Ferguson* 1985 4 SA 843 (A) 851-2 where the appeal court refused to admit belated evidence that the deceased had done most of his work away from the illegal premises at his home.

[338]*Shield Insurance v Booysen* 1979 3 SA 953 (A) 964D-E 'Even though some of the activities mentioned... had ceased before his death and others were found by the Court *a quo* to be illegal, they can nevertheless be relied upon as some indication of his earning capacity'. Visser 1991 *THRHR* 782 792 and Reinecke 1988 *De Jure* 221 erroneously suggest that illegal earnings cannot serve as evidence of earning capacity.

[339]See Davel 'Broodwinner' 416 for comments upon *Fortuin v Commercial Union Assurance* 1983 2 SA 444 (C). The value of the chance of legality was awarded in *Dhlamini v MMF* 1992 1 SA 802 (T). In *Nkwenteni v Allianz Insurance* 1992 2 SA 713 (Ck) compensation was denied for a period of temporary illegality. See *Xatula v Minister of Police, Transkei* 1993 4 SA 344 (Tk).

an illegal activity. The prospect of legitimate earnings in the foreseeable future will limit the application of the illegality rule.[340]

[12.19.4] Punishment to match the crime: The Criminal Procedure Act[341] provides for forfeiture by a convicted person of money or goods associated with the offence. The courts have adopted a strict interpretation of these provisions which limits forfeiture to things intimately associated with the crime for which the charge has been made. Thus a drug dealer was permitted to retain money received from a previous drug transaction for which she had not been charged.[342] In another matter money accumulated from illicit diamond dealing was returned to a person accused of stealing funds from the police.[343] The reluctance of the courts to order forfeiture in these criminal matters provides a startling contrast to the willingness with which compensation has been denied in civil matters[344] for earnings or support derived from mildly illegal activities. The crimes which come for consideration by the courts apprised with the assessment of damages are generally of a commercial licensing nature for persons of low income and poor education.[345] The penalty which the victim or the deceased's family is required to bear is usually out of all proportion to the severity of the criminal or immoral conduct in question.[346] This point is all the more relevant when the compensation is to be paid from a public fund, such as the MMF, to which the victim may himself have contributed. The effect of denying compensation is to deprive the victim or his family of a public insurance benefit.[347]

[12.19.5] Versari in re illicita: The law requires a person to wear a safety belt or crash helmet when travelling by motor vehicle. A person may be severely injured whilst breaking the law by failing to wear the required safety equipment. The courts will only reduce the damages payable if the absence of the crash helmet or safety belt was causally related to the

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[340]*Shield Insurance v Booysen* 1979 3 SA 953 (A); *Fortuin v Commercial Union Assurance* 1983 2 SA 444 (C).

[341]s35 of Act 51 of 1977. See comment thereon in *S v Dlova* 1986 3 SA 248 (NC) concerning the 'drakoniese bepalings in art 190' of the Liquor Act 87 of 1977.

[342]*S v Tsoai* 1981 1 SA 348 (O).

[343]*S v Campbell* 1985 2 SA 612 (SWA).

[344]*Fortuin v Commercial Union Assurance* 1983 2 SA 444 (C) goes some way to achieve this. *Mankebe v AA Mutual Insurance* 1986 2 SA 196 (D) 203C-D states that 'A Court will not readily deprive a dependant of his right to recover damages resulting from the death of the deceased... unless the prohibition against his activities of necessity indicates that it was the intention of the legislation to regard such activities as being both illegal and invalid'. The court (at 201) distinguished itself from the ruling in *Santam Insurance v Ferguson* 1985 4 SA 843 (A). It seems that the potentially draconian ruling in *Ferguson*'s case has been substantially mitigated by the *Mankebe* decision.

[345]Unlicensed hawker *Dhamini v Protea Assurance* 1974 4 SA 906 (A); unlicensed weekly cinema and dances with unlicensed sale of liquor *Shield Insurance v Booysen* 1979 3 SA 953 (A); unlicensed taxi driver *Mba v Southern Insurance* 1981 1 SA 122 (Tk); unlicensed panelbeating premises *Santam Insurance v Ferguson* 1985 4 SA 843 (A).

[346]If punishment is to be meted out to the victim or his family it should be limited to the relevant criminal penalty: Atiyah 'Accidents Compensation & the Law' 3ed 565. See too *Mankebe v AA Mutual Insurance* 1986 2 SA 196 (D) 203B-E.

[347]'This Court has repeatedly held that the general object of the Act is "to afford third parties the widest possible protection against loss sustained through the negligent or unlawful driving of a motor vehicle"' *Constantia Insurance v Hearne* 1986 3 SA 60 (A) 67I. See too footnote 129.

damage suffered.[348] The attitude of the appellate division to the problem of seat belts and crash helmets stands in sharp contrast to the largely draconian approach to illegal earnings.[349] When earnings are tainted with illegality a test of causal relevance may reveal that compliance with the relevant regulation would have been a simple formality[350] and that the earnings would have been the same had they been earned legally.

[12.19.6] Hypothetical legality: There seems little doubt that where the illegality of the conduct has permitted far greater earnings than would otherwise have been possible the court would be acting correctly if it assessed compensation on the basis of the lower earnings to which the victim would have been restricted had he acted legally.[351] The illegality rule has been handed down to us from a previous era when the range of criminal offences was far less complex than today.[352] An inquiry into what the victim could have earned had he acted legally may, of course, reveal that he would have been unemployed. Boberg has suggested that when the earnings are illegal then compensation may still be awarded for loss of 'earning capacity' as distinct from 'loss of earnings'.[353] This is essentially the same approach to that suggested above provided that one substitutes for the words 'earning capacity' the 'probable earnings[354] of the victim *had he acted legally*'. Visser[355] states this principle in the form that regard should only be had to the 'legal' components of the damaged patrimonium.[356]

[12.19.7] Tax evasion: Tax evasion is the most common form of 'white-collar' illegal activity one encounters when assessing damages for personal injury or death. In *Santam Insurance v Fick*[357] the injured claimant was compensated for lost earnings which derived from a questionable scheme apparently designed to evade tax. The court ordered that a copy of the record be sent to the tax authorities.[358] Where there are assets which can be

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[348]Boberg 'Delict' 400-39.

[349]*Dhlamini v Protea Assurance* 1974 4 SA 906 (A); *Santam Insurance v Ferguson* 1985 4 SA 843 (A). *Shield Insurance v Booysen* 1979 3 SA 953 (A) does not follow the pattern of the other two judgments and reflects a welcome compassionate approach to the problem.

[350]Or at least achievable on due compliance with certain requirements (see *Mankebe v AA Mutual Insurance* 1986 2 SA 196 (D) 203E).

[351]See *Lebona v President Insurance* 1991 3 SA 395 (W) 402-3 and paragraph concerning tax evasion. See too Visser 1991 *THRHR* 782 793; Dendy 1987 *SALJ* 243-52.

[352]'It would be artificial in the extreme and reminiscent of mid-Victorian hypocrisy to deny him the aid of the law' *Mankebe v AA Mutual Insurance* 1986 2 SA 196 (D) 201I-J.

[353]Boberg 'Delict' 594(d). See too Blommaert 1981 *TSAR* 176; Dendy 1987 *SALJ* 243 248-51. The ambiguities inherent to the expressions 'loss of earnings' and 'loss of earning capacity' are dealt with at 218 above.

[354]*Carstens v Southern Insurance* 1985 3 SA 1010 (C) 1020G. See too 235 above.

[355]Visser 1991 *THRHR* 782.

[356]See too Davel 1992 *De Jurè* 83-95 and 48 above.

[357]1982 (A) (unreported 24.5.82 case 282/79/AV).

[358]The damages award had not been reduced for notional taxation. The order was probably with a view to the levying of tax on the damages award but would also have brought the tax-evasion activities to the attention of the authorities.

attached[359] the threat of arrear and penalty taxes usually ensures an out-of-court settlement. The *Fick* ruling suggests that if a history of successful tax evasion were to be proved, for example cash takings from the till, the court would nonetheless assess compensation as though such income had been properly subject to taxation. In other words damages would be assessed on the basis of what would have happened if the victim had acted legally.

[12.19.8] Enforceability of illegal contracts: One finds mention in the judgments of an inquiry into the enforceability of contracts concluded during the immoral or illegal activity.[360] All the illegal or immoral business activities which have come before the courts in South Africa would seem to have been conducted in cash.[361] It follows that for practical purposes the enforceability of the contracts is irrelevant.[362] Cash receipts will generally be retained regardless of questions of illegality. The principle of *in pari delicto potior est condicio defendentis* is likely to apply to most circumstances.[363] In terms of the Criminal Procedure Act[364] forfeiture will only be ordered in respect of the particular act for which there has been a successful prosecution[365] and then only to a very limited extent.[366]

[12.19.9] Post-injury illegality: The courts have not yet expressed an opinion on how to deal with the claimant who was acting legally prior to his injury but who after the injury takes to an illegal activity.[367] The likely solution is to have regard to what he could earn now injured if he acts within the law.

[12.19.10] Immorality: There is no recorded instance in South African law where compensation has been denied for an activity which is immoral but not illegal.[368] It could be argued that by reason of disuse immorality on its own is no longer a ground for refusing compensation. A suitable test case for this point would be injury to the kept mistress of a married man. May such a woman claim for the loss of the financial benefits of her relationship? Apart from the high deduction required for general contingencies one suspects that explicit compensation would be denied on moral grounds but that an award would be

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[359]For dependants this would mean that the deceased has left an estate. The prospect of a tax claw-back with penalties is only relevant to the dependants who have inherited, usually the widow.

[360]*Mba v Southern Insurance* 1981 1 SA 122 (Tk) 125D; *Ferguson v Santam Insurance* 1985 1 SA 207 (C) 208G.

[361]See footnote 345.

[362]*Metro Western Cape (Pty) Ltd v Ross* 1986 3 SA 181 (A) 194-5.

[363]The rule will be applied circumspectly with a view to maintaining justice between man and man: *Jajbhay v Cassim* 1939 AD 537 544; *Osman v Reis* 1976 3 SA 710 (C) 712G-713B.

[364]s35 Act 51 of 1977.

[365]*S v Tsoai* 1981 1 SA 348 (O).

[366]*S v Mudau* 1980 3 SA 1079 (V); *S v Marais* 1982 3 SA 988 (A); *S v Campbell* 1985 2 SA 612 (SWA).

[367]For instance the victim who has become an epileptic by reason of his injuries and then takes to driving a taxi.

[368]*Dhlamini v Protea Assurance* 1974 4 SA 906 (A) makes reference to immoral activities ('*contra bonos mores*' at 912F and 'teen goeie sedes' at 915C). Considering the cultural diversity of South Africa, notably the polygamy issue, the courts will in future need to tread warily in this area.

made for the chance that she might in time have married the man[369] or provided for herself through some other legal activity.[370]

[12.20] CONCLUSIONS

The action for damages for personal injury is undoubtedly the most comprehensive of all rights of action available under the Aquilian action. The damages payable are not limited by considerations of foreseeability[371] to the same extent as with negligent misstatements or damage to goods. The action compensates losses not only by way of earnings and necessary expenditure but also loss of support and general damages by way of pain and suffering and loss of the amenities of life. The action has been extended to those who suffer loss by reason of their duty to support the victim during the pre-trial period.[372] For injury to a child the parent may claim for expected expenditure even after the pre-trial period.[373] These alternative actions complicate claims procedures and can lead to a loss going uncompensated.[374] It would be preferable to have one single action by the victim with a procedure whereby the court can order that part of the damages awarded be used to reimburse those who have assisted the victim.[375]

When a breadwinner is killed the family loses the benefit of his or her earnings. For this reason many issues relevant to assessing damages for personal injury are equally relevant to the assessment of damages for loss of support. In this regard one might mention in particular considerations of the nature of a lump-sum award,[376] likely earnings,[377] income tax,[378] and illegality.[379] For an injured person a deduction will be made for saved living expenses.[380] With the death of a breadwinner a deduction is made for the saving in the deceased's living expenses.

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[369] After he had divorced his present wife. Loss of marriage prospects will be compensated (see 223).

[370] See, for instance, *Dhlamini v MMF* 1992 1 SA 802 (T).

[371] See 51.

[372] See 193.

[373] See 254.

[374] See, for instance, *Erdmann v Santam Insurance* 1985 3 SA 402 (C) 409H.

[375] See paragraph 11.3.2.

[376] See 47 and 215.

[377] See 235.

[378] See 231.

[379] See 267.

[380] See 225.

CHAPTER 13

THE DEPENDANTS' ACTION

Summary: *The loss of a* ***right*** *to support determines who may bring an action for loss of support. The financial loss suffered is, however, not the right to support but the value of the financial benefits expected from the breadwinner in consequence of this right. This financial value will be assessed according the value of the chance of receiving the support. The working wife who earns sufficient to support herself has no right, at that point in time, to claim support from her husband. The loss by the dependants will be assessed without regard for compensating advantages other than inheritance and remarriage. The focus is on the support which would have been provided had there been no death. The widow who takes up employment after the death will be compensated as though she were unemployed. Conversely a widow who ceases employment in consequence of the death has no claim under the dependants' action for this loss of earnings. Loss of inheritance prospects will be compensated to the extent that these would have provided ongoing support. Although dependants have in theory a claim for loss of support during the 'lost years' such claims will usually fail due to difficulties with evidence.*

[13.1] THE RIGHT OF ACTION

[13.1.1] Confined to loss of support: The dependants' action 'aims at placing them in as good a position, **as regards maintenance**, as they would have been in if the deceased had not been killed'.[1] Compensation under the dependants' action is restricted to loss of support and a separate action must be brought to recover any loss of earnings or medical expenses caused by the same wrongful act.[2] General damages are not claimable under the dependants' action.[3] If damages were ever to be awarded for the inconvenience and psychological shock flowing from the death of a breadwinner[4] this would open the way to awards to dependants

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[1] *Legal Insurance v Botes* 1963 1 SA 608 (A) 614E (emphasis supplied).

[2] *Evins v Shield Insurance* 1980 2 SA 814 (A).

[3] *Jameson's Minors v CSAR* 1908 TS 575 602; *Union Government v Warneke* 1911 AD 657 662 666; *Hulley v Cox* 1923 AD 234 243; Davel 'Broodwinner' 442-3. See 258 above.

[4] In *Bourhill v Young* [1942] 2 All ER 396 (HL) compensation was denied for psychological shock resulting from the killing of a cyclist 15 meters away from the claimant. The deceased was not related to the claimant, therefore the court found that there was no duty of care. In *Bester v Commercial Union Versekeringsmpy* 1973 1 SA 769 (A) damages were awarded to a child who suffered a severe psychological neurosis after his brother was run down in front of him and killed. It is not essential to establish a personal apprehension of danger (780-1). In *Boswell v Minister of Police* 1978 3 SA 268 (E) the claimant suffered physical harm from shock by reason of being falsely told of the death of her nephew.

for general damages arising from death.[5] Such awards would not, however, be made under the dependants' action but under the action for personal injury.

[13.1.2] Damages for shock: There seems to be little reason why dependants who suffer the agonies of the shock of the death of a breadwinner should not successfully claim compensation for personal injury. If the death of the breadwinner is foreseeable then so too, one would think, is the shock and emotional disturbance of the dependants.[6] In *Boswell*'s case[7] damages were awarded for the emotional consequences of shock caused by a false statement to the victim that her nephew, whom she had brought up, had been shot dead. In *Sebatjane*'s case[8] compensation was awarded for the psychological shock of a miscarriage. In *Masiba*'s case the victim had suffered severe shock from the sight of his stationary car being collided with by another vehicle. In consequence of the shock he died. A right of action for damages for loss of support was granted to his dependants on the basis that had he merely been injured he would have had a personal right of action for damages for the injury suffered.[9] Emotional shock of short duration will, it seems, not be compensated.[10]

[13.1.3] Damages to the deceased's estate: The estate of a deceased victim has a claim for general damages provided *litis contestatio* has been reached before the death occurs.[11] This benefit will only accrue to the dependants if they are heirs. The benefit would have the effect of reducing the damages claimable by the dependants under the dependants' action[12]

[13.1.4] Historical origins: The right of action for damages arising from wrongful killing is said to have its origins in the Germanic law.[13] The right of action of a widow is neither Roman[14] nor Germanic.[15] It reflects the influence of the Church.[16]. The widow, however, was not a blood-relative of her deceased husband and was only admitted as a

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[5]General damages for the death of a breadwinner are permitted in England (s3(1) Administration of Justice Act of 1982).

[6]*Smit v Abrahams* 1992 3 SA 158 (C).

[7]*Boswell v Minister of Police* 1978 3 SA 268 (E). General damages of R750 in 1977 equivalent to R5600 in 1992. See too *Alcock v Chief Constable of the South Yorkshire Police* [1991] 4 All ER 907 (HL) and *Hevican v Ruane* [1991] 3 All ER 65 (QBD).

[8]*Sebatjane v Federated Employers' Insurance* 1989 4 C&B H2-1 (T).

[9]*Masiba v Constantia Assurance* 1982 4 SA 333 (C) 343.

[10]Neethling Potgieter & Visser 'Deliktereg' 2ed 243n333.

[11]*Potgieter v Rondalia Assurance* 1970 1 SA 705 (N); *Potgieter v Sustein (Edms) Bpk* 1990 2 SA 15 (T).

[12]See 333.

[13]*Jameson's Minors v CSAR* 1908 TS 575 584; *Union Government v Warneke* 1911 AD 657 664; *Union Government v Lee* 1927 AD 202 221; *SA Nasionale Trust & Assuransie v Fondo* 1960 2 SA 467 (A) 471-2; *Legal Insurance v Botes* 1963 1 SA 608 (A) 614; Davel 'Broodwinner' 32-68; Davel 'Skadevergoeding' 14-25.

[14]The Roman law did not allow compensation to anyone for the death of a freeman; Davel 'Broodwinner' 11-17.

[15]Davel 'Broodwinner' 55-6. The widow was not a blood-relative of her deceased husband.

[16]Davel 'Broodwinner' 58-9. See too paragraph 3.2.5.

claimant at a fairly late stage. Grotius,[17] writing about 1620, records the modern form of the dependants' action with damages payable to the widow and children, rather than the heirs. The Council of Trent[18] in 1563 laid the groundwork for the registration of marriages. Prior to this time proof of marriage could be a contentious issue.[19] We may surmise that proper evidence of marriage by way of registration greatly facilitated the admission of a widow as a claimant for damages arising from wrongful killing. This development would have been encouraged by the Church in keeping with a policy of strengthening the status of a registered holy marriage.

Quantification of the damages by reference to the earnings of the deceased[20] and excluding general damages for emotional distress[21] is typically Roman. The accommodation under the modern Aquilian action of a right of action for damages caused by wrongful killing has been by way of extension of the Roman actions for loss of earnings.[22] The major, if not the sole contribution of the Germanic law has been the ethic that compensation should be awarded in the event of wrongful killing.

[13.1.5] The injured breadwinner: If a breadwinner is severely injured the dependants have no right of action for the loss of support which they suffer.[23] They are obliged to make do with what their breadwinner is awarded, even if the breadwinner's damages are reduced by reason of his contributory negligence.[24] If the breadwinner's expectation of life has been reduced by his injuries, and for this reason less damages awarded, the dependants are obliged to wait until he dies before they can bring an action for damages during the 'lost years'.[25]

[13.1.6] Quantum: The quantification of the damages suffered by the dependants is done on much the same basis as for an injury. This means that considerations of capitalize first[26] and difference afterwards and vice-versa alternate in the assessment process. Historically there used to be a comparison of what would have accrued but for the death with what has

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[17]*Inleiding* 3.33.2.

[18]*Decretum tametsi (de reformatio matrimonii)* of 1563 of the Council of Trent became law in Holland through the Political Ordinance of 1580 and introduced civil marriage to the Roman-Dutch law.

[19]Hahlo & Kahn 'The SA legal system' 450.

[20]'*Operarum quibus caruit aut cariturus est*: D9.3.7 *actio de effusis vel deiectis*; D9.1.3 *actio de pauperie*. When fixed amounts were specified these were in the nature of punitive fines rather than compensation (Davel 'Broodwinner' 18-19 21-2). Under Germanic law the *weergeld* was assessed on a tariff basis with little or no regard for lost earnings (Davel 'Broodwinner' 37-8).

[21]Davel 'Broodwinner' 11-17.

[22]Feenstra 1972 *AJ* 227 229.

[23]*De Vaal v Messing* 1938 TPD 34; *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 305-6.

[24]Apportionment of Damages Act 34 of 1956. *De Vaal v Messing* 1938 TPD 34 40-2.

[25]*Lockhat v North British & Mercantile Insurance* 1959 3 SA 295 (A) 305-6; *Evins* v Shield Insurance 1980 2 SA 814 (A). For further discussion see 227, 347.

[26]See 65 and 68.

accrued having regard to the death,[27] but, as I will enlarge upon in due course, this is no longer a generally valid statement. The relevance of living expenses to the assessment process is far more obvious under the dependants' action than under the action for loss of earning capacity. Not the least because a deduction needs to be made from the deceased's projected earnings for the proportion which would have been consumed by his own living expenses. The determination of damages for loss of support may, in theory, proceed entirely by reference to the costs of supporting the family and without regard for the deceased's earnings. Assessments done on this basis are rare for a common household but are done when the dependants lived separately from the deceased.[28]

[13.1.7] Past loss: An award of damages for past loss of support is subject to the same anomalies and problems that attach to an award for past loss of earnings.[29] This is an anomalous state of affairs because while the breadwinner is still alive past support cannot be claimed from him[30] except in so far as debt has been incurred.[31] Dependants who claim damages for loss of support may have their damages reduced if the evidence indicates that their breadwinner would from time to time not have provided them with support notwithstanding his duty to do so.

Utility theory suggests that if a dependant has died prior to receiving compensation then the dependant's estate should have no right to compensation other than for debt that has been incurred. This conclusion follows from the observation that a past loss of earnings or support is more in the nature of general damages than patrimonial loss.[32] In practice the estate of the deceased dependant will probably be made an award for past loss of support.

[13.1.8] Curator bonis: When a person is injured and is incapable of managing the compensation money an additional award will usually be made for the costs of a suitable *curator bonis* or trustee.[33] It is quite common that the compensation money for dependent children requires similar supervision and costs of administration. There is no recorded instance in South Africa where a court has allowed a claim for the costs of a *curator bonis* or trustee for children compensated for loss of support. If it be correct that the claim by the dependants for damages is confined to loss of the support[34] then such additional costs are

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[27]*Union Government v Warneke* 1911 AD 657 665; *Dippenaar v Shield Insurance* 1979 2 SA 904 (A) 917; *Santam Insurance v Meredith* 1990 4 SA 265 (Tk) 267C-H.

[28]For black migrant workers evidence as to application of funds is generally unobtainable or flagrantly unreliable (eg support payments of R200 per week alleged for a man earning R600 per month). One then usually relies on a two-parts-one-part apportionment of earnings (see section 13.8).

[29]See paragraph 12.3.1.

[30]*Oberholzer v Oberholzer* 1947 3 SA 294 (O) 298; Voet *Ad Pandectas* 2.15.14 '*Non enim quisquam in praeteritum vivit aut alendus est*' (Gane's translation 'A person does not live nor have to be maintained in arrear'); Hahlo 'Husband & wife' 5ed 137.

[31]*Farrell v Hankey* 1921 TPD 590 596; *Williams v Shub* 1976 4 SA 567 (C) 570G-H.

[32]See paragraph 12.3.1.

[33]See paragraph 12.13.6.

[34]See paragraph 13.1.1.

not claimable in law. It deserves note in this regard, however, that in one instance a court has ordered that a lower discount rate of interest be used to allow for the fact that the awards of damages were to be paid into the guardian's fund.[35]

[13.2] REQUIREMENTS FOR A CLAIM

[13.2.1] Financial value: In order to claim damages for loss of support the dependant must demonstrate not only that he or she would have had a right to claim support from the deceased had he lived but also that the deceased would have provided support in response to that right.[36] The right to support alone is not sufficient to give rise to a right of action for damages. It is also necessary to establish that the benefits to be provided by the breadwinner had a financial value. In other words there may have been a duty of support but a nil or negligible chance that any support would have been provided in response to this duty. Conversely support may have been provided, but if there was no duty to do so then no compensation will be awarded.[37]

The value of the chance of the provision of support will generally be compensated and thus found a right of action.[38] *Van Vuuren v Sam*[39] suggests *obiter* that for a successful action for damages **the right to support must exist at the time of the death.** The somewhat stringent requirements expressed in this judgment may reflect no more than a general tendency by the courts to view with circumspection claims for loss of support by parents.[40] In *Young v Hutton*[41] the claimant's mother was killed on the day he was due for discharge from hospital. Compensation was awarded for the loss of the support which would have been provided **after** discharge from hospital.

For certain family relationships the rules of pleading do not require allegation or proof of the financial requirements necessary to create a duty of support. This does not mean to say that such financial requirements cease to be relevant:[42]

> '...the typical situation in which the husband and father maintains his wife and children finds expression in the rule that the mere existence of one of these

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[35]*Boonzaier v Provincial Insurance* 1954 1 C&B 87 (C).

[36]*Van Vuuren v Sam* 1972 2 SA 633 (A) 635D-E 'Om in haar aksie te kon slaag, moes die appellante bewys... dat die oorledene tot haar onderhoud bygedra het en dat hy dit gedoen het en sou voortgegaan het om dit te doen omdat hy regtens daartoe verplig was'. The existence of a duty of support does not mean that support will be provided (eg *Senior v NEG Insurance* 1989 2 SA 136 (W)). One needs to distinguish between support but for the death and support having regard to the death. The *Senior* case was concerned with the latter.

[37]See, for instance, footnote 45.

[38] Recognition of a right to compensation for the loss of a prospective right to support is to be found in *Jacobs v Cape Town Municipality* 1935 CPD 474 479; *Petersen v South British Insurance* 1964 2 SA 236 (C) 238E-F ; *Manuel v African Guarantee & Indemnity* 1967 2 SA 417 (R) 419.

[39]1972 2 SA 633 (A) 635D-E.

[40]See *Singh v Santam Insurance* 1974 4 SA 196 (D) 199A.

[41]1918 WLD 90.

[42]Boberg 'Persons & family' 251n9 (emphasis supplied) relying on *Gildenhuys v Transvaal Hindu Educational Council* 1938 WLD 260 262. See too Corbett & Buchanan 3ed 81-2.

> relationships **creates a rebuttable presumption of a duty of support**; there is no necessity to allege and prove the need for support and the ability to supply it where a wife or a child claims maintenance' (or damages for loss thereof).

There is evidence that for some lawyers the requirement 'duty of support' does not mean an enforceable duty of support having regard to the relative financial standings of the family members, but merely the existence of the relevant family relationship.[43]

[13.2.2] Enforceable duty of support: In order for a duty of support to arise the dependant must firstly be 'in need', secondly the breadwinner must have sufficient means, and thirdly the law must impose a duty to provide support in the circumstances.[44] Need and ability to pay, that is to say the fist two requirement may be satisfied, and there may be a factual provision of support, but if the law does not impose a duty then there will be no right of action for damages.[45] The breadwinner may have the ability to pay but if the dependant earns sufficient income the duty to provide support does not arise. Thus, for example, a wife who works reduces or eliminates her right to claim support from her husband.[46] The right of parents to claim support from a child is dependent on a 'spartan standard' of indigency.[47] Dependency may not exist at the time of the death but there may be a substantial prospect that it will arise in years to come, for example when a father retires without pension.[48]
[13.2.3] Spes of support: The above considerations suggest that it is more appropriate to speak of the loss of a *spes*, or 'expectation' of support[49] rather than the loss of a right to support. The right to support determines whether or not a claim may be brought but it does not determine how much the lost right is worth.[50] Compensation is not based upon a

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[43]Loss of support for a widow is sometimes done using 'method B' (see paragraph 13.9.10), an approach which proceeds from the premise that a wife has a right to support from her husband even if she earns more than sufficient to support herself. See too footnote 314.

[44]*Senior v NEG Insurance* 1989 2 SA 136 (W) 139.

[45]eg *Barnes v Union & SWA Insurance* 1977 3 SA 502 (E) where granddaughter was supporting grandmother while children of claimant were able to provide the support; *Vaughan v SA National Trust & Assurance* 1954 3 SA 667 (C) concerning uncle and indigent nephews and nieces.

[46]*Milns v Protea Assurance* 1978 3 SA 1006 (C) 1012-13. See 309 below.

[47]Boberg 'Persons & family' 310-12; *Van Vuuren v Sam* 1972 2 SA 633 (A) 642-3; *Singh v Santam Insurance* 1974 4 SA 196 (D) 199A 'The means test as applied to a father's claim for maintenance from a son is a stringent one'. Calculations of poverty datum lines (PDL) include allowance for modest hedonistic expenditure on cigarettes, magazines, film shows, etc (Newall 'Living Wage' 29-35; Budlender 1985 (Saldru working paper 63)).

[48]*Young v Hutton* 1918 WLD 90; *Jacobs v Cape Town Municipality* 1935 CPD 474 479; *Petersen v South British Insurance* 1964 2 SA 236 (C) 238; *Manuel v African Guarantee & Indemnity* 1967 2 SA 417 (R) 419 (more generally see chapter 4 at 71).

[49]Grotius *De iure belli ac pacis* 2.17.14 uses the word '*spes*' to describe the claim by dependants for loss of support: '*Dare tantum, quantum illa spes alimentorum, ratione habita aetatis occisi, valebat*'.

[50]The common failure of the courts to distinguish rights from financial loss is evident in *General Accident Insurance v Summers* 1987 3 SA 577 (A) 612C 'Wat skade weens verlies van onderhoud betref, is daarop gewys dat al gesê is dat dit om die verlies van 'n reg gaan: kyk *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376C, waar Holmes AR gesê het: "What she has lost is a right - the right of support". Die getuie Koch het... gepraat van die verlies van 'n "expectation" wat vergoed moet word' (but see previous footnote).

consideration of rights and duties.[51] Rights and duties are, however, relevant to the likelihood that support would have been provided.[52]

[13.2.4] Value of prospective support by a child: Parents of a young dependent child may have had hopes of themselves being supported by that child in time to come. If that child is killed the parental prospect of support in the distant future will usually be outweighed by the more immediate saving from being spared the cost of supporting that child.[53]

[13.2.5] Changing circumstances: A married woman who works and earns sufficient income to support herself has no right to claim support from her husband.[54] By the same token a husband who earns sufficient income to support himself has no right to claim support from his working wife. Changed circumstances[55] for example, cessation of employment due to childbirth, would give rise to a right to support for the wife. Conversely an elderly husband may retire and become dependent on his younger wife. A young dependent child will grow up and become a breadwinner. An important feature of **an enforceable right to claim support is that it comes and goes with the passage of time.** The family relationship alone is not sufficient. The necessary financial conditions must also be satisfied.

[13.2.6] The posthumous child: The rights of a so-called *nasciturus* are suspended pending its birth as a viable legal subject. Such a child has a right to claim compensation for loss of support.[56] This is an example of the award of compensation for a prospective loss of support notwithstanding that no support was being provided at the time that the breadwinner died.[57]

[13.2.7] Death before a wedding: If a bridegroom is killed on his way to the wedding there is no reason in principle why the bride should not have a claim for compensation for the

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[51]Van der Walt 'Sommeskadeleer' 181 184-5 241-5; Bloembergen '*Schadevergoeding*' 26-7.

[52]Van der Walt 'Sommeskadeleer' 285sup ('The inadequacy of a classification by rights and duties) beteken nie dat die bestaan van so 'n reg vir die skadeleer irrelevant is nie. Die bestaan van 'n reg op die verwagte vermoënstoename sal naamlik lig werp op die mate van waarskynlikheid waarmee daardie vermoënstoename te verwag was'.

[53]Boberg 1964 *SALJ* 147-50; Spiro 1968 *THRHR* 118-23. This point is sharply emphasised by successful actions for damages for unwanted birth (*Edouard v Administrator Natal* 1989 2 SA 368 (D); 1990 3 SA 581 (A); Lind 1992 *SALJ* 428).

[54]'No maintenance will be awarded to a wife who is able to support herself... In the ordinary course, maintenance awards will be "more lavish to a wife than to an ex-wife"' Hahlo 'Husband & wife' 5ed 361. See 309 below.

[55]*Gildenhuys v Transvaal Hindu Educational Council* 1938 WLD 260 262-3; *Oberholzer v Oberholzer* 1947 3 SA 294 (O) 297; *Woodhead v Woodhead* 1955 3 SA 138 (SR) 139-40. It is said that the primary burden falls on the husband but this, it seems, is no more than a reflection of the economic fact that husbands usually earn more than their wives (Boberg 'Persons & family' 250).

[56]*Chisholm v ERPM* 1909 TH 297 301; *Pinchin v Santam Insurance* 1963 2 SA 254 (W).

[57]cf *Van Vuuren v Sam* 1972 2 SA 633 (A) 635D-E 'Om in haar aksie te kon slaag, moes die appellante bewys... dat die oorledene tot haar onderhoud bygedra het... '; Davel 'Skadevergoeding' 59n129.

value of the chance of support had the marriage ceremony been completed.[58] There is no doubt that if the bride were seriously injured on her way to the wedding and the marriage plans thereby aborted she would be entitled to compensation for loss of the financial benefits of marriage.[59]

[13.2.8] Support by parents: Parents are obliged to support their children according to their means.[60] The typical family must 'cut its cloth' according to the income available. Under circumstances of a common household whatever income the family has must be given over to the support of all.[61] The duty of support by a child to a parent only arises if the child has more than sufficient income for his own support.[62] There is a reciprocal duty of support between parent and child which suggests that the same principle applies to the duty of a parent to support a child.[63] It follows that a duty of support towards the children only arises if the relevant parent has sufficient income to cover the cost of his own support.[64] A claim by the wife for support from her husband may be resisted or abated on the grounds that she has income of her own.[65] One would expect a similar abatement if the wife had assets, albeit no income.[66] A claim by children for support from their working mother may be resisted on the grounds that the mother has not sufficient for her own support[67] and the father has more than sufficient to support himself and the children.[68] A working child with

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[58] *Young v Hutton* 1918 WLD 90; *Jacobs v Cape Town Municipality* 1935 CPD 474 479; *Petersen v South British Insurance* 1964 2 SA 236 (C) 238; *Manuel v African Guarantee & Indemnity* 1967 2 SA 417 (R) 419; *Blyth v Van den Heever* 1980 1 SA 191 (A) 225-6.

[59] *Commercial Union Assurance v Stanley* 1973 1 SA 699 (A) 704G.

[60] *Union Government v Warneke* 1911 AD 657 668-9; *Burns v NEG Insurance* 1988 3 SA 355 (C) 363I-J; Boberg 'Persons & family' 254.

[61] *Oosthuizen v Stanley* 1938 AD 322 331 'The father has a duty to sustain his wife and children and it would be wholly artificial to consider the question on the footing that the father is entitled to provide for himself in priority to his wife and children under his roof'.

[62] *In re Knoop* (1893) 10 SC 198; *Jacobs v Cape Town Municipality* 1935 CPD 474 479. Regard being had to the general standard of living of the family.

[63] *S v Pitsi* 1964 4 SA 583 (T) 586H 'Aangesien dit 'n wederkerige verpligting is behoort dieselfde stelling ook te geld wat betref die verpligting van die vader om sy kind te onderhou'.

[64] *Ncubu v NEG Insurance* 1988 2 SA 190 (N) 196; *Burns v NEG Insurance* 1988 3 SA 355 (C) 363-4. See 308 below.

[65] *Karrim v Karrim* 1962 1 PH B4 (D); *Milns v Protea Assurance* 1978 3 SA 1006 (C) 1012-13. Hahlo 'Husband & wife' 5ed 361.

[66] *Volkenborn v Volkenborn* 1946 NPD 76; Boberg 'Persons & family' 268n73.

[67] *Ncubu v NEG Insurance* 1988 2 SA 190 (N) 196. In *Lamb v Sack* 1974 2 SA 670 (T) 674E the court ostensibly apportioned the costs of support 3 to 1, the ratio of the relative incomes. The father's income, however, was taken net of his living costs and without any apparent adjustment for substantial assets; the mother was not working but was deemed to earn one third of the father's net income. The reported judgment is silent as to the living costs of the mother. One presumes that full provision was being made for her own living costs and that none of her income from notional employment was needed for her own support. See too *Mentz v Simpson* 1990 4 SA 455 (A) and 308 et seq below.

[68] *Burns v NEG Insurance* 1988 3 SA 355 (C) 363-4 (by implication); *Zimelka v Zimelka* 1990 4 SA 303 (W) 306H 307J. In *Woodhead v Woodhead* 1955 3 SA 138 (SR) 142-3 the mother earned £50 per month and the father £90 per month. The court allocated liability for past support equally between the parents. The father was also burdened

limited income may remain partially dependent if the parents assist with maintaining a higher standard of living.[69] Sons undergoing military service may remain dependent but generally at a lower level than when full-time at home.[70]

[13.2.9] Support by children: A parent who is in need may claim support from a child who has the means to pay, that is say income, or assets, in excess of what that child needs for his own living expenses.[71] The need of a father will not be determined by what he needs for himself alone but will have regard to the other members of the household to whom he owes a duty of support.[72] Notwithstanding such considerations the right of a parent to claim support from a child will be viewed with circumspection.[73] The test for indigency is relative to the financial standing and social status of the family.[74] Poverty datum lines[75] (PDL) do not provide a satisfactory test of indigency because they reflect an absolute standard which ignores the financial and social standing of the family. Conservatism is clearly justified under circumstances where the provision of support, if any, is temporary.[76] The circumstances of a parent/child relationship can suggest permanence.[77] A parent who

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with payments of arrear maintenance and legal costs for his ex-wife, a consideration which may explain the split adopted. Future support for the children was by agreement. In general a court must be 'fully informed as to the relative financial position of the parties' (*Buch v Buch* 1967 3 SA 83 (T) 88D). See 308 below.

[69]Boberg 'Persons & family' 261n55 262n57.

[70]*Gold v Gold* 1975 4 SA 237 (D).

[71]*In re Knoop* (1893) 10 SC 198; *Jacobs v CT Municipality* 1935 CPD 474 479; *Khan v Padayachy* 1971 3 SA 877 (W).

[72]*Oosthuizen v Stanley* 1938 AD 322 331. This text suggests that the father claims in a representative capacity for himself and the needy siblings of the deceased (see section 11.4). This conclusion is reinforced by the rule that payment of maintenance must be to the custodian parent and not to the child (Hahlo 'Husband & wife' 5ed 409). See too Dendy 1990 *SALJ* 155.

[73]*Singh v Santam Insurance* 1974 4 SA 196 (D) 199A 'the means test as applied to a father's claim for maintenance from a son is a stringent one'. This stringent view would seem to derive from the word 'necessities' (see *Oosthuizen v Stanley* 1938 AD 322 328). Consideration of poverty datum lines suggests that need includes allowance for modest hedonistic expenditure such as cigarettes, magazines and film shows etc (Newall 'Living Wage' 29-35). Some indulgence in hedonism is implicit to the example of rough bread/white bread cited in *Van Vuuren v Sam* 1972 2 SA 633 (A) 643E. The word 'necessity' is ambiguous: On one hand it might imply poverty, subsistence on the breadline; on the other hand it implies a compelling need to maintain a quality of lifestyle consistent with the overall status and financial means of the family as a whole. The 'stringency' test of *Singh v Santam Insurance* suggests an over-emphasis on the 'breadline' interpretation.

[74]*Oosthuizen v Stanley* 1938 AD 322 328 'a state of comparative indigency or destitution'; *Van Vuuren v Sam* 1972 2 SA 633 (A) 635D-E. In *Van Blerck v Van Blerck* 1972 2 SA 799 (C) the provision of a Mercedes Benz motor car was held to be in accordance with the standard of living of the family. The two-parts-one-part method for apportioning family income (see section 13.8) provides a useful test for relative indigency when there is a common household.

[75]Newall 'Living Wage' 29-35.

[76]*Van Vuuren v Sam* 1972 2 SA 633 (A) 635D-E includes the requirement that the deceased 'sou voortgegaan het om dit te doen'.

[77]eg circumstances of *Wigham v British Traders Insurance* 1963 3 SA 151 (W) (middle-aged spinster daughter supporting aged mother).

is in good health and able to go out to work will generally fail to establish indigency.[78] A parent without income must utilise capital.[79]

[13.2.10] The obligation to seek work: This falls most heavily on an able-bodied father of working age. A housewife who has earning capacity is not obliged to go out and seek work, provided her husband's income is sufficient. However, once the parents are divorced she may be expected to seek employment, primarily to support herself but also, in suitable circumstances, to make a contribution to the support of her children. A child at school is usually not expected to seek work and may remain unemployed for purposes of tertiary education, provided he or she will benefit and the parents have the necessary means.[80] A widowed housewife, however, is not expected to seek work in order to mitigate her damages.[81]

It deserves note that although it is said that the duty of support falls primarily on the father[82] this statement reflects no more than that fathers usually earn more than mothers and are thus usually better able to support the child.[83] It is quite conceivable, albeit unusual, that it is the father who stays at home and the wife who goes out to work.[84]

[13.2.11] Temporary unemployment: In a depressed economy it is common that able-bodied persons without capital are unable to obtain employment.[85] Unemployment is as much a cause of need as disability or old age and judicial views that presume employment when jobs are plentiful[86] may need revision in times of depression. The major feature of unemployment due to economic conditions is that the need is temporary, even though it may endure for several years. Any award of compensation should include a substantial deduction for the contingency of finding employment, and would hence reflect the value of the chance of indigency. One would need to offset against such a claim the value of the chance that the deceased would have become temporarily dependent on the claimant. Much of the law governing claims for maintenance from living breadwinners centres around ponderous maintenance orders intended to remain in place for fairly extended periods of time. There

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[78]*Oosthuizen v Stanley* 1938 AD 322 328; *Anthony v Cape Town Municipality* 1967 4 SA 445 (A) 456D-E; *Van Vuuren v Sam* 1972 2 SA 633 (A) 638F-G.

[79]See footnote 66.

[80]See footnote 151.

[81]See section 13.10.

[82]Hahlo 'Husband & wife' 5ed 135.

[83]Boberg 'Persons & family' 250 'Although the duty is usually regarded as burdening the husband in favour of the wife, this is only because in practice it is usually he who has the greater means and ability to fulfil it'. See too Hahlo 'Husband & wife' 5ed 135.

[84]Hahlo 'Husband & wife' 138n80.

[85]See, for example, Business Day 10.9.90 page 3 'Number of jobless is now dangerous'; 12.6.90 pages 1 2 'And while recent studies have shown a substantial narrowing of the black/white wage gap in the past decade, the SAARF figures suggest no such narrowing and possibly a widening of the racial gap in household income. The paradox, one economist said, was probably because of soaring black unemployment'. These considerations suggest increasing dependency by black households on those members who retain employment.

[86]See, for instance, *Lamb v Sack* 1974 2 SA 670 (T) 674; *Lebona v President Insurance* 1991 3 SA 395 (W) 403B-C.

is no good reason why claims for damages for loss of support should be inhibited by the proceduralism of formal maintenance orders.

[13.2.12] Support by siblings: A duty of support arises between siblings but falls away at age 21 if the dependent sibling is able-bodied.[87] The duty of support between siblings does not arise if either parent is capable of providing the needed support.[88] When there is a common household it can be argued that the siblings have no direct claim for support from the sibling acting as breadwinner because their father has an over-riding right to claim what he needs for himself and those dependent on him.[89] A single group action of this nature may be limited to R25000 in terms of MVA legislation.[90] In order to maximize the coverage provided under the Act it is likely that a court would find in favour of separate claims for the father and each of the siblings.[91] The ruling in *Oosthuizen v Stanley*[92] would then only be relevant to the question of indigency. The judgments reveal substantial confusion as to the proper procedure for claims by siblings and parents.[93] The safe procedure for claimants, and defendants, is to insist on a separate claim for each and every dependant.[94]

Legitimate children are not obliged to support their illegitimate siblings.[95] It seems likely that illegitimate children of the same mother do have a duty of support to one another.

[13.2.13] Support for stepchildren: No direct duty of support arises between stepparents and stepchildren.[96] A woman married out of community of property and without resources

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[87]Boberg 'Persons & family' 276; *Seatle v Protea Assurance* 1983 (C) (unreported 6.5.83 case I.77/81).

[88]In *Barnes v Union & SWA Insurance* 1977 3 SA 502 (E) duty between grandmother and granddaughter failed because the grandmother could look to her children for support; see Boberg 'Persons & family' 275.

[89]*Oosthuizen v Stanley* 1938 AD 322 331 'In my judgment the fact that an indigent child might have a separate claim for support from a brother is not sufficient reason for testing a father's need for support by the amount that he needs for himself alone. The father has a duty to sustain his wife and children and it would be wholly artificial to consider the question on the footing that the father is entitled to provide for himself in priority to his wife and children under his roof'; cf *De Vaal v Messing* 1938 TPD 34. It seems that the claim in *Oosthuizen v Stanley* was brought as a single action by the father of the two deceased children. The marriage was in community of property.

[90]Article 46 of MMF agreement ito Act 93 of 1989.

[91]*Union & SWA Insurance v Fantiso* 1981 3 SA 293 (A) 300C 'The general object of the Act (Compulsory Motor Vehicle Insurance Act 56 of 1972) is intended to afford third parties the widest possible protection against loss'; *Constantia Insurance v Hearne* 1986 3 SA 60 (A); *Ismail v General Accident Insurance* 1989 2 SA 468 (D).

[92]1938 AD 322 331.

[93]*Oosthuizen v Stanley* 1938 AD 322 331; *Jacobs v Cape Town Municipality* 1935 CPD 474; *Smith v President Insurance* 1990 (C) (unreported 31.10.90 case 15283/89 in Wynberg magistrates' court). In *Anthony v Cape Town Municipality* 1967 4 SA 445 (A) husband and wife married in community of property had brought separate actions. s15(30) of Matrimonial Property Act 88 of 1984 mentions only actions for loss of earnings (more generally see section 11.4).

[94]In *Seatle v Protea Assurance* 1983 (C) (unreported 6.5.83 case I.77/81) separate claims were brought for each dependant. Prescription does not run against a minor but it does run against the mother of the children (eg article 56 of MMF agreement ito Act 93 of 1989).

[95]Spiro 'Parent & Child' 3ed 370n94.

[96]*Jacobs v Cape Town Municipality* 1935 CPD 474 481-2; *S v MacDonald* 1963 2 SA 431 (C); Spiro 'Parent & Child' 3ed 48-9 370n97.

other than support from her husband has no duty to support her children.[97] Marriage in community of property provides the wife with a resource from which to provide support for her children from a previous marriage. She then has an enforceable duty, a liability which, by reason of the community of property, her husband may have to meet.[98] **Stepchildren are thus, it seems, entitled to compensation on the death of their stepfather.** Such claims are derivative through the marital rights of the mother. For this reason it would be correct to make a deduction from the stepchildren's damages for their mother's prospects of further remarriage in community of property. It can be argued that stepchildren do not have separate claims, but that their mother should claim on a group basis for what she needs for herself and her children.[99] Where there is a common household, stepchildren will usually enjoy *de facto* support whether by right or not.[100]

[13.2.14] In-laws: A son-in-law married out of community of property has no duty to support his parents-in-law.[101] A wife, without financial resources and married out of community of property, has no duty to support her parents. It is otherwise if she is married in community of property. Her husband may then be called upon to meet this obligation to her parents.[102] In the absence of a legal obligation a husband may well feel a moral obligation to provide such support.[103] This might take the form of a contractual undertaking with his wife or her parents. Such an undertaking would not give rise to a claim for damages by the parents-in-law *eo nomine*. It is arguable that the support provided to the wife extends to what she needs to support her parents.[104] This may lead to an increase in her claim. A decision to exclude the parents' contractual support from the wife's claim would then raise the question of a deduction for what would in any event have been provided to the parents. In *Munarin*'s case[105] a deduction was made for the support which the deceased had provided to his mother without being legally obliged to do so. Circumstances

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[97]A court might insist that she go out to work in order to provide herself with the necessary means (*Lamb v Sack* 1974 2 SA 670 (T)).

[98]*Ford v Allen* 1925 TPD 5 11; *Hartman v Krogscheepers* 1950 4 SA 421 (W); *S v MacDonald* 1963 2 SA 431 (C) 433C; *Wilkie-Page v Wilkie-Page* 1979 2 SA 258 (R) 259G-H; Spiro 'Parent & Child' 3ed 368n74; s17(5) of Matrimonial Property Act 88 of 1984. There is a presumption that a marriage is in community of property (*Brummond v Brummond's Estate* 1993 2 SA 494 (Nm)).

[99]Following *Oosthuizen v Stanley* 1938 AD 322 331. This result seems unlikely under modern conditions: see *Constantia Insurance v Hearne* 1986 3 SA 60 (A) 67I; *Ismail v General Accident Insurance* 1989 2 SA 468 (D).

[100]*S v MacDonald* 1963 2 SA 431 (C) 432E 'The accused obviously agreed to treat the three stepchildren as his own, as an inevitable concomitant with the maintenance of the household, while he had the *consortium* of his wife'.

[101]*Ford v Allen* 1925 TPD 5 6; *Jacobs v CT Municipality* 1935 CPD 474 (stepmother). A brother-in-law is not obliged to support an indigent sister-in-law (*Vaughan v Santam Insurance* 1954 3 SA 667 (C) 670-1).

[102]*Ford v Allen* 1925 TPD 5 11 'As her husband is liable for her obligations, by reason of the community, he may conceivably be called upon to carry out his wife's obligations, and thus to support his father-in-law'. See too s17(5) of Matrimonial Property Act 88 of 1984.

[103]*Ford v Allen* 1925 TPD 5 11 'There would clearly be a moral obligation on such a son-in-law to render his father-in-law maintenance'.

[104]By analogy with *Oosthuizen v Stanley* 1938 AD 322 331 'The father has a duty to sustain his wife and children and it would be wholly artificial to consider the question on the footing that the father is entitled to provide for himself in priority to his wife and children under his roof'.

[105]*Munarin v Peri-Urban Areas Health Board* 1965 1 SA 545 (W) 556-7; see too Davel 'Skadevergoeding' 109.

may suggest that the support was tenuous and should be ignored because it may have terminated at any stage. Alternatively, when the parents share a common household and the continuation of the support is highly likely it might be argued that the provision of support is gratuitous and thus to be ignored.[106] It would be false, however, to suggest that such support was truly gratuitous because it would have been provided in terms of a strong moral duty.[107]

[13.2.15] Support between grandparents and grandchildren: A grandparent owes a duty of support to a grandchild provided the parents of the children have not sufficient income to support themselves.[108] Conversely a grandchild owes a duty of support to a grandparent provided the parent of the grandchild has not the means to support the grandparent.[109] The mere fact that a grandchild has undertaken to support a grandparent, and has provided support in terms of this agreement, is not sufficient to found a right of action for damages for loss of support.[110]

[13.2.16] Uncles nephews and nieces: There is no duty of support between an uncle and his indigent nieces and nephews,[111] and *vice-versa*.

[13.2.17] Support by breadwinner's estate: The common-law duty of mutual support between husband and wife is terminated by the death of one of the spouses.[112] It has been said that a parent's duty of support to the children does not terminate on death but continues as a charge against the estate.[113] The better view, however, is that duty of support by the estate is separate and distinct from the duty owed by the deceased parent.[114] By reason of statute a widow now has similar rights to a child.[115] A dependant is not required to mitigate damages by first excussing the estate of the deceased.[116] In one instance a claim for support had been successfully lodged against the estate prior to finalization of the claim for

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[106]*President Versekeringsmpy v Buthelezi* 1977 1 PH J26 (A).

[107]See for instance *Van Blerck v Van Blerck* 1972 2 SA 799 (C).

[108]*Gliksman v Talekinsky* 1955 4 SA 468 (W).

[109]*Barnes v Union & SWA Insurance* 1977 3 SA 502 (E).

[110]*Barnes v Union & SWA Insurance* 1977 3 SA 502 (E).

[111]*Vaughan v Santam Insurance* 1954 3 SA 667 (C).

[112]*Glazer v Glazer* 1963 4 SA 694 (A); Boberg 'Persons & family' 279-83.

[113]Spiro 'Parent & Child' 3ed 365-6; Boberg 'Persons & family' 283-9; Reinecke 1976 *TSAR* 26 51-2. See 341 below.

[114]*Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D. *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A).

[115]Maintenance of Surviving Spouses Act 27 of 1990.

[116]*Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 306A 'If the wrongdoer is unable to pay, they (the dependants) may be able to claim support from the estate of the deceased'; *Groenewald v Snyders* 1966 3 SA 237 (A) 247B-C 'But it does not seem to me... that the defendant can dictate to them as to the debtor to whom they must look'.

damages and a deduction against the damages was ordered.[117] It is doubtful that the executor acted in the proper interests of the heirs by admitting claims for support against the estate when there was a damages action pending which would have rendered the children self-supporting.

The principles for assessing a claim against a deceased estate are materially different from those governing a claim for damages for loss of support.[118]

[13.2.18] Contractual right to support: Voet states that compensation for loss of support may be claimed by reason of a contract to provide support.[119] A similar conclusion has been drawn as regards Grotius.[120] Despite such eminent authority, and the seemingly obvious desirability of protecting agreements to provide support, the modern South African law denies a right of action for damages based on the loss of contractual support: On the basis of this reasoning a divorced woman has no claim for damages for the wrongful killing of her ex-husband from whom she was receiving maintenance even though her right derives from an order of court.[121] Prior to the passing of legislation[122] the widow of a black customary union had no right to compensation.[123] The widow of a Hindu or Moslem marriage remains without a right of action.[124] The overly zealous technical emphasis by South African courts upon the right to support sets South African justice apart from other common-law jurisdictions where a more pragmatic and liberal approach prevails.[125] Common sense suggests that compensation ought to have been awarded to the grandmother in *Barnes v Union & SWA Insurance*,[126] that a divorced woman should be able to claim for

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[117]*Heyns v SA Eagle Versekeringsmpy* 1988 (T) (unreported 6.7.88 case 13468/86).

[118]See paragraph 6.3.4.

[119]*Ad Pandectas* 25.3.4; Davel 'Skadevergoeding' 66-7; Van der Merwe 1961 *THRHR* 133. See too footnote 125 below.

[120]*Inleiding* 3.33.2; *Chawanda v Zimnat Insurance* 1990 1 SA 1019 (ZH) 1025G 1026B (confirmed on appeal reported 1991 2 SA 825 (ZS)).

[121]*SA Nasionale Trust & Assuransie v Fondo* 1960 2 SA 467 (A) 472-3; *Heyns v SA Eagle Versekeringsmpy* 1988 (T) (unreported 6.7.88 case 13468/86). The usual wording of maintenance agreements ensures a continuing right to maintenance from the estate of the deceased, if there is an estate (Boberg 'Persons & family' 250n6).

[122]s31 Black Laws Amendment Act 76 of 1963. In the absence of such legislation in Zimbabwe, but having regard to other legislation recognizing a customary union, the High Court has recognized such a union as a proper basis for compensation (*Chawanda v Zimnat Insurance* 1990 1 SA 1019 (Z); 1991 2 SA 825 (ZS)).

[123]*SA Nasionale Trust & Assuransie v Fondo* 1960 2 SA 467 (A); Francis & Freemantle 1961 *SALJ* 103-5; Boberg 1961 *SALJ* 214-16.

[124]For some Hindu marriages the officiating officer is a designated marriage officer in terms of s3(1) Marriage Act 25 of 1961. Such marriages are monogamous civil marriages. Where the marriage is potentially polygamous it does not enjoy legal force (*Ismail v Ismail* 1983 1 SA 1006 (A)). There are no Moslem marriage officers because the requirement of monogamy is contrary to the Koran.

[125]Davel 'Broodwinner' 380-3 records that compensation has been awarded in Holland to the partner of a 'gay' relationship. See too Cooper-Stephenson & Saunders 'Damages in Canada' 405; Luntz 'Damages' 2ed 403n3; McGregor 'Damages' 14ed 860-1.

[126]1977 3 SA 502 (E).

loss of her right to maintenance,[127] and that a marriage by customary law, be it Hindu Moslem or black, should found an action for damages for loss of support.[128]

In *Kewana*'s case[129] it was held that the damages claimable under MVA legislation are not restricted by what may be claimed under the Roman-Dutch law. *In casu* damages for loss of support were awarded to a child who had been adopted by the deceased in terms of customary law. The modern Roman-Dutch law would deny such a child a right of action. The reasoning adopted in the *Kewana* case is to be lauded, but some doubt may be expressed that the appellate division in South Africa, as presently constituted, would endorse such a liberal interpretation of MVA legislation.[130]

[13.2.19] Diverse uncompensated obligations to maintain: A contract to provide support which has been made an order of court, has special features which set it apart from other forms of contract.[131] Contractual undertakings to provide support which have not been made an order of court do not enjoy special status. They cannot be varied by the court, and are, it seems, on the same footing as contracts of employment as regards allowance for increases to offset inflation and changing needs. If there is no reciprocal duty on the dependant to render services a contract to provide support has a charitable quality. This will usually fall short of outright donation by reason of the existence of a moral, or even legal obligation to provide the support.[132] Obligations derived from Bantu and other customary law, which do not enjoy the force of law, are probably best classified as contractual by analogy with the *naturalia* of a commercial contract which are determined by commercial custom. The wife under a black customary union has a statutory right to support[133] but not even this, it seems, is sufficient to found an action for damages for loss of support.[134]

[13.2.20] Black Laws Amendment Act: The statutory right[135] of the widow of a black customary union to claim for loss of support is subject to certain limitations:[136] Where there

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[127]Francis & Freemantle 1992 *SALJ* 197 200-203.

[128]Provided the financial requirements of need, and ability to pay, are met.

[129]*Kewana v Santam Insurance Co Ltd* 1993 (Tk) (unreported 28.02.93 case 112/88).

[130]See paragraph 10.4.4 and the unnecessarily conservative approach there adopted by the appellate division towards compensation for 'loss of buying power'. On the other hand it has been said that MVA legislation should be interpreted liberally (*Constantia Insurance v Hearne* 1986 3 SA 60 (A) 67I quoted in footnote 347 at 268).

[131]*Strauss v Strauss* 1974 3 SA 79 (A) 93-7; *Levin v Levin* 1984 2 SA 298 (C).

[132]See for instance *Van Blerck v Van Blerck* 1972 2 SA 799 (C).

[133]s5(6) Maintenance Act 23 of 1963.

[134]Or is it? The recent judgment in *Lebona v President Insurance* 1991 3 SA 395 (W) 397G 403B-C suggests otherwise but would seem to have been less than circumspect as to the consequences of its dicta (see Paterson 1992 *SALJ* 18).

[135]s31 Black Laws Amendment Act 76 of 1963. More generally see Van der Vyver 1964 *THRHR* 94-115.

[136]Davel 'Skadevergoeding' 60n142 maintains, following Van der Vyver, that 'daar selde berekenbare vermoënskade sal wees aangesien die inheemse reg op 'n ander wyse voorsiening maak vir die afhanklikes'. This incorrect conclusion ignores the ruling in *Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D which prevents account being taken of alternative sources of support.

is more than one widow the compensation is limited to what would have been payable had there been only one widow. Where one wife has been married by civil rites then the customary unions with the other wives *ipso facto* are dissolved with a consequent loss of the right to claim compensation.[137] Since 2 December 1988 the situation has been reversed: After that date the pre-existence of one or more customary unions renders any subsequent civil marriage nul and void, save if it has been concluded with the one and only customary-law wife.[138] This well-intended legislation has served only to cause greater confusion in an already difficult area of the law.

Customary union, that is non-civil marriage, is probably the most common matrimonial regime in South Africa. If the Roman-Dutch law is to have relevance for many of the people of South Africa then a potentially polygamous customary union (Black, Hindu or Moslem) should have the same legal status as a civil marriage.[139] In the Transkei[140] and Ciskei[141] civil and customary marriages have equal status in the sense that fact of one does not terminate the other, save that a second civil marriage is bigamous. The state of the law in South Africa would be greatly improved by making statutory provision for a polygamous[142] civil marriage which can be selected at the outset, just as the accrual system or community of property can presently be selected under South African law.[143]

[13.3] PERIOD OF DEPENDENCY

[13.3.1] Between husband and wife: The duty of support between husband and wife may continue throughout their joint lifetimes[144] or until the breadwinner ceases to have an income from which to provide support, or until divorce.[145] If the wife is somewhat younger than her husband she may have the prospect of supporting him in his old age. If the husband has a substantial pension he will be able to continue to provide support despite

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[137]*Nkambula v Linda* 1951 1 SA 377 (A); Van der Vyver 1964 *THRHR* 94 108-9. Some protection for black wives by customary union has now been introduced by s1 Marriage and Matrimonial Property Act 3 of 1988 amending s22 Black Administration Act 38 of 1927: a party to a customary union may no longer conclude a civil marriage except with the other party, and then only if the customary-law wife is the husband's only wife.

[138]s1 Marriage and Matrimonial Property Law Amendment Act 3 of 1988. See Maithufi 1992 *THRHR* 628-33.

[139]Maithufi 1986 *De Rebus* 555-8; 1990 *De Jure* 326-33; Francis & Freemantle 1961 *SALJ* 103-110; 1992 *SALJ* 197-203; Boberg 1961 *SALJ* 214-16; 'African Customary Law' Dlamini 71-85; Labuschagne 1993 *De Jure* 171-5; *Chawanda v Zimnat Insurance* 1990 1 SA 1019 (Z); 1991 2 SA 825 (ZS).

[140]ss37 38 of Transkei Marriage Act 1978.

[141]ss 2 & 6 of Customary Law Amendment Decree 1991 (Ciskei).

[142]Or potentially polygamous. Dhlamini prefers to describe the black customary union as 'polyganous' (see 'African customary law' 74-81).

[143]Matrimonial Property Act 88 of 1984.

[144]The joint expectation of life is shorter than the individual expectation of life of either husband or wife. Actuaries do not work with expectations of life but with the chances of the joint survival of both spouses to each and every relevant year. It is false reasoning to suggest that because men have shorter life expectancies than women the calculation should be based on the man's expectation of life. Some wives do predecease their husbands (see paragraph 5.4.8).

[145]See paragraph 13.12.6. Maintenance may be paid after divorce but a divorced woman does not have a right of action for damages for loss of support (see paragraph 13.2.18).

having ceased to work. For persons without other income the state pension for women commences at age 60 and for men at age 65.[146] The same pension is paid to the husband as to the wife. The payment of this pension is subject to a means test based on the joint incomes of husband and wife.[147] It follows that an unemployed wife cannot get a state pension if her husband works and earns an income.

[13.3.2] Divorce: This terminates the common-law duty of support between spouses. Any maintenance payable thereafter is based on a separate contract and compensation will not be awarded for the loss thereof.[148] The deduction for general contingencies will be increased for the contingency of divorce.[149] The determination of the deduction for general contingencies has been assessed with regard to the prospect that maintenance would have been awarded in the event of divorce.[150] This latter approach is difficult to reconcile with an approach which denies compensation for the loss of maintenance paid in terms of a divorce order. What, for instance, of the husband who is killed on the day before the order for divorce is to be given? Does his wife then get compensation for the loss of maintenance? If he had been killed a day later she would have been denied a right of action?

[13.3.3] Children: The duty to support a child continues until the child marries or becomes self-supporting. Some children, such as mongoloids or epileptics, may remain dependent upon the parents throughout the joint lifetimes of parents and child. Children with serious disability are entitled to a state disability grant from age 18. In the lower-income groups this pension will usually render the child self-supporting. Parents who can afford tertiary education for a child are obliged to provide it for those of their children who have the necessary ability.[151] A child below the age of 15 years may not be employed in a factory, shop or office.[152]

[13.3.4] Economic depression: Depressed economic conditions coupled with poor education facilities leads to children in the lower-income groups remaining at school, or at home without employment, until fairly advanced ages such as 30.[153] Regulations permit the authorities to evict pupils who have not attained a certain minimum education by a specified

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[146]There is draft legislation to consolidate all the welfare acts (see 199) and to increase the retirement age for women to 65.

[147]'Die middeltoets by staatsouderdompensioene' Marais 1980/81 *TASSA* 83-102.

[148]*SA Nasionale Trust & Assuransie v Fondo* 1960 2 SA 467 (A) 472-3; *Heyns v SA Eagle Versekeringsmpy* 1988 (T) (unreported 6.7.88 case 13468/86). See paragraphs 13.2.18 and 13.2.19.

[149]*De Jongh v Gunther* 1975 4 SA 78 (W). For a discussion of divorce rates see paragraph 13.12.6.

[150]*De Jongh v Gunther* 1975 4 SA 78 (W) 83F relying on Boberg 1964 *SALJ* 194 202n42.

[151]*Ex Parte Pienaar* 1964 1 SA 600 (T) 607B-E.

[152]s17(a) of the Basic Conditions of Employment Act 3 of 1983.

[153]Based on evidence of dependency for death claims submitted to my office. See Beckett 'No black and white solutions' 1990 *Optima* 112-33 for a description of conditions in black schools.

age.[154] Is a child dependent if unemployed but seeking employment? The answer seems to be yes.[155] Clearly a substantial deduction needs to be applied to any compensation for the contingency of obtaining employment. Informal employment can be difficult to prove and some scepticism may be expected when a healthy child of age 30 claims to be continuously dependent on his father.[156]

[13.3.5] Military service: A child undergoing military service is usually not fully self-supporting.[157] Disputes on this issue are best resolved by allocating to such a child a half-share of family income during the period of military service.[158]

[13.3.6] Dependent parents: The duty of support owed by a child to the parents can continue throughout their joint lifetimes. The contingencies attaching to the continued provision of such support will usually be high.[159] A long history of bachelorhood and/or a common household with the parents will usually increase the prospect of continuing support. If the parents have provided the family home then this constitutes a major contribution and reduces dependency on the child.[160] A measure of the value of such a contribution might be the rental which the parents could have obtained if paying lodgers had shared the house.

[13.3.7] Siblings: The duty of support between siblings terminates at age 21 if the dependent sibling is of sound mind and body but may continue throughout life for a sibling in poor health.[161]

[13.3.8] Dependency but for the death: The dependants are to be compensated for the support which would have been provided had death not occurred. It is usual that compensation is not paid immediately and delays of 3 to 5 years are not uncommon. The death of a father may force children who would normally have enjoyed the benefit of further education to go out to work. The compensation should, in such circumstances, be based upon the notional period of dependency had the death not occurred, and should assume that further education had been provided. The fact that the child has received earnings in the

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[154]R1143 of 29.05.81: The director-general may refuse admission to, or continuing attendance at, a standard 5 class for persons over the age of 16. Attendance at a standard 9 or 10 class may be refused for persons over the age of 18.

[155]See paragraph 13.2.11.

[156]With the adverse economic conditions that prevail in South Africa this situation is not uncommon. Business Day 12.6.90 pages 1 2 notes that while average black wages have increased faster than inflation the average income of black households has not done so. The explanation could be that an increasing number of family members are dependent on those who remain employed.

[157]*Gold v Gold* 1975 4 SA 237 (D).

[158]See section 13.8.

[159]McGregor 'Damages' 14ed 898; see too footnote 73.

[160]See footnote 66.

[161]*Ex parte Pienaar* 1964 1 SA 600 (T) 607E-F. See paragraph 13.2.12.

interim should be ignored for the same reasons that the earnings of a widow will be ignored.[162]

[13.4] FINANCIAL BENEFITS OF DEPENDENCY

[13.4.1] Likely support: Compensation is not restricted to what the dependants could claim from their breadwinner as of a right. The damages will take account of 'the station in life of the parties and the comforts, conveniences and advantages to which they had been accustomed'.[163] In like manner damages for loss of earning capacity are assessed having regard to what the victim was likely to receive under the contract of employment, not merely what he had a right to claim under the contract.[164] The fact that a benefit is at the discretion of the breadwinner or his employer does not mean that it will be ignored for compensation purposes, the compensation will include the value of the chance of receiving such a benefit.[165] The value of lost support is usually determined by reference to the earning capacity of the deceased breadwinner after deduction of taxation and that part of his earnings which would have been applied to his own support.

[13.4.2] Benefits in kind: When the deceased has provided accommodation, meals, domestic help, and electricity **over and above his cash income** the value of these benefits will be added to the cash benefits.[166] The value of the use of a car will also be added.[167] These benefits may have been provided by the deceased's employer or from the deceased's own assets or business. If the benefit has derived from the deceased's assets allowance must be made for the cost of maintaining a car or house, if this cost would in the normal course of events have been met from the deceased's cash income. Failure to make this adjustment will lead to an overstatement of the value of the benefits enjoyed by the family. Conversely a farmer's reported income may have been calculated net of the expenses of maintaining home and car. In such cases no further deduction needs to be made.

[13.4.3] 'Social advantages': The dependants are entitled to compensation for 'loss of social advantages'.[168] Compensation will only be awarded if such losses are of a patrimonial nature.[169] The one recorded instance of an award for 'loss of social advantages' was for a breadwinner who had accumulated a considerable fortune notwithstanding a relatively low

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[162]See section 13.10.

[163]*Jameson's Minors v CSAR* 1908 TS 575 602.

[164]eg overtime, future promotions and increases to offset the effects of inflation.

[165]See chapter 4.

[166]*Laney v Wallem* 1931 CPD 360 361; *Legal Insurance v Botes* 1963 1 SA 608 (A) 616C-F.

[167]*Milns v Protea Assurance* 1978 3 SA 1006 (C) 1011B; *Burns v NEG Insurance* 1988 3 SA 355 (C) 361-2 (the unusual approach adopted in the *Burns* case reflected the manner in which plaintiff had pleaded).

[168]*Roberts v London Assurance (3)* 1948 2 SA 841 (W) 851 'The wife and children of a person of high or exalted position may reasonably expect tangible advantages to flow from their relationship to such person and no doubt their loss of such advantages could be taken into account in assessing damages'.

[169]*Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 721sup 'In both *Hesselson*'s case and *Roberts*'s case the Court was dealing with a loss of social advantages on the footing of a loss of an actual patrimonial nature'.

income.[170] The analysis of business capital above[171] has included capital accumulation as part of earning capacity.[172] Conversely a history of declining net capital resources should give rise to a lower award than that indicated by the immediate income of the deceased.[173] If capital accumulation is to be included under the earning capacity of the breadwinner then there is no need to retain 'social advantages' in this sense as a class of loss. Since the expression has no other identifiable meaning it does not add anything of value to the discussion of damages for loss of support.

[13.4.4] 'Comforts, conveniences and advantages': These are the financial benefits that are enjoyed by the dependants not as of a right but rather due to the social and financial status of the breadwinner. Such benefits would include such things as transport in a status motor car, or overseas travel as a member of the deceased's family. It would also include benefits provided by way of discretion or goodwill, such as the provision of a motor car for personal use, or an overseas holiday. This does not mean to say that every person who suffers financial loss by reason of the death of a breadwinner has a right of action for compensation.[174] The right to claim support, albeit at a lower level than was being provided, is essential to a successful action for loss of support.[175] The duty of support will usually have regard to the general standard of living of the family.[176] It follows that the benefits described above might well be viewed as part of what the deceased was obliged to contribute in any event. In one instance the donation of an expensive motor car was considered in keeping with the standard of living of the family.[177]

Just as the damages will be increased for 'comforts, conveniences and advantages' attaching to the provision of support so too will the damages be reduced for liabilities of the breadwinner which he was likely to incur, albeit not in terms of a legal obligation. One has here in mind the provision of additional money to a self-supporting mother[178] or the

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[170]*Hesselson v SAR* 1921 (T) (unreported 2.9.21) quoted in *Roberts v London Assurance (3)* 1948 2 SA 841 (W) 851.

[171]See paragraph 12.17.4.

[172]See too *Roberts v London Assurance* 1948 2 SA 841 (W) 851; *Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A) 488-9; *Santam Insurance v Meredith* 1990 4 SA 265 (Tk) 269-70. Davel 'Skadevergoeding' 105 notes that 'Daar word verder geen aftrekkings gemaak ten opsigte van verbandlenings nie'.

[173]See paragraph 12.17.2.

[174]Francis & Freemantle 1961 *SALJ* 103-5 provides an example of the confusion that has been created in the minds of some by the 'comforts, conveniences and advantages' criterion. Boberg 1961 *SALJ* 214 points to the errors of the Francis & Freemantle view.

[175]See paragraph 13.2.2.

[176]Hahlo 'Husband & wife' 5ed 135 'The scale upon which support must be rendered depends upon the social position, financial means and style of living of the spouses'.

[177]See footnote 132.

[178]See, for instance, *Munarin v Peri-Urban Areas Health Board* 1965 1 SA 545 (W) 556-7; see too Davel 'Skadevergoeding' 109.

maintenance of a so-called 'common-law wife'[179] or the indulgence in expensive hobbies.[180]

[13.5] USE OF ASSETS

[13.5.1] Real rate of return: The income of the deceased may include income from investments. Fixed interest investments will provide interest income at a nominal rate of, say, 16% per year. It will usually be wrong to add such interest income to the deceased's other income and then project future income by adding inflation. The interest income based on a nominal rate cannot, of its own accord, be expected to grow in future years.[181] For this reason it is preferable to add to the deceased's income from earnings a real rate of return[182] of, say, 2,5% per year on the capital invested. If one then assumes plough back of the inflation component[183] of the interest then it is reasonable to project future investment income by adding inflation. The rate chosen will usually be consistent with the net capitalization rate to be used for capitalizing the award. One does find very low real rates of return being ordered by the courts for capitalization purposes.[184] The use of such very low rates implies that the notional support provided by the deceased from investments, or the use of assets such as the family home, should be assessed at an equally low value in real terms.

[13.5.2] Use value of a home: Over extended periods of time rentals and property values tend, with a good many leads and lags, to move in line with inflation.[185] The value to the family of the use of the family home is usually not equal to the full rental value of the property. Ownership implies expenses,[186] property taxes and maintenance.[187] If the net

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[179]See paragraph 13.7.7.

[180]See paragraph 13.7.13.

[181]Although it may go up over short periods of time when interest rates rise, but conversely it will fall when interest rates fall.

[182]For a definition of 'real rate of return' see 128.

[183]See paragraph 8.1.7.

[184]*Oberholzer v NEG Insurance* 1988 4 C&B A3-1 (C) (1% py); *Gallie v NEG Insurance* 1992 2 SA 731 (C) (1,5% py); *Dusterwald v Santam Insurance* 1990 4 C&B A3-45 (C) 60-4 (1% py).

[185]Statistical News Release P0102 'Survey of Flats - May 1990' 11 shows the index for flat rentals to have risen from 36,4 in 1978 to 159,1 in 1990, an average compound rate of increase of 13% py compared to a comparable increase in the CPI of 14,5% py. *TRENDS* September 1991 30 gives an index for house prices which increases from 30,4 in 1978 to 178,7 in 1990, an average compound rate of increase of 15,9% py which was in excess of the rate of inflation. These figures suggest that shortfalls in rent increases are compensated by greater increases in property values. Considering the erratic nature of markets there probably have been periods when both rents and prices have simultaneously dropped behind the rate of inflation, and vice-versa.

[186]The extent to which immovable property is maintained will determine its rate of depreciation. If maintenance expenses are extensively avoided then the property will usually depreciate in value. An older person may deliberately engage in such a strategy in order to maximise income and in the knowledge that he will not live long enough to need worry about the reduced value of the property.

[187]'To this, I think, should be added the value of the right of occupying, jointly with her husband and children, the house, which was his property... its net rental return, after deducting rates and repairs, would probably not be more than £120, and I think £40 would be an ample allowance for her right of occupancy' *Laney v Wallem* 1931 CPD 360 361. In *Maasberg v Hunt Leuchars & Hepburn* 1944 WLD 2 13 the present value of the right of occupancy

real return on property exceeded the net capitalization rate used for discounting to present value this would imply that every claimant could invest his or her award in lettable property and thus that a higher rate should be used for discounting. It follows that the use value of ownership of a house should be in conformity with the net rate to be used for capitalizing the award.[188] The yearly value to the family is then that amount in rands which will give a real rate of return on the value of the property equal to, say, 2,5% per year. The property value for this purpose should be taken net of bond indebtedness. This is so because the dependency calculation is usually done without deduction for the repayments which pay for that portion of the value of the family home which is bonded. Bond subsidies by the employer are usually added to the overall income from which the deceased is deemed to have provided support.[189]

[13.5.3] Wife's assets: If a wife has assets her right to claim support from her husband will, in the event of separation, be abated by reason of the support she can draw from such assets. If the wife owns the family home, for instance, she cannot then call upon her husband to provide her with a home, although if she has no cash income she may ask for assistance with the expenses of keeping the home. Where her investments provide a cash income the benefit thereof may be by way of a full nominal rate of return of, say, 16% per year. Alternatively if there is ploughback of income, or limited income such as dividends, then a real rate of return of, say, 2,5% per year might be used. The use of a real rate of return would be a fair approach if the wife owns and provides the family home.

[13.5.4] Donations between spouses: The assets owned by the wife may have been given to her by her husband. In a time when donations between spouses were revocable there was much to be said for treating such assets as belonging to the husband. Donations between spouses are no longer revocable, even donations made prior to the passing of the Act.[190] The wife is rendered self-supporting by the donation and it would seem proper to reduce the value of her right to support from her husband by reason of assets held in her own right. The fact of such donations in the past may justify an increase to the wife's award to allow for the chance of further such donations being made in future years.

[13.5.5] Communal assets: Where husband and wife were married in community of property they were joint owners of the family assets and as such each would have contributed equally by way of assets to the support of the family. The wife would hold such assets in her own

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of a wife without children was taken to be roughly equal to the accelerated value of the inheritance of the property. In *Legal Insurance v Botes* 1963 1 SA 608 (A) 616D-F the *Maasberg* approach was rejected in favour of the approach in *Laney v Wallem*. The *Maasberg* approach is at best a very rough approximation which may hold true under limited circumstances.

[188]There would be a tax advantage for an owner-occupier as compared to rental income. Because expenses are tax-deductible the tax advantage will usually be very small.

[189]This is consistent with the approach in *Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A) whereby savings are included in the income of the family apportioned to determine the notional level of support (see footnote 172).

[190]s22 of the Matrimonial Property Act 88 of 1984.

right and the value of her right to support from her husband should be abated accordingly.[191] If the community assets included business assets then the deceased's income would have been provided in part from the assets owned by his wife. It would be appropriate to reduce the deceased's income to allow for this contribution.[192]

[13.5.6] Going concerns: A business may be worth more as a going concern than in liquidation. Sale of the business during the lifetime of the deceased would have produced a higher value than in liquidation after his death. The right to support during the deceased's lifetime would usually have regard to the value of the business as a going concern whereas the deduction for inheritance would have regard to the actual realized value. If the widow successfully takes over the business her earnings from the business must be ignored[193] but her advantage by way of inheritance would be the enhanced value of the business as a going concern.

[13.5.7] Rapidly depreciating assets: The above analysis of assets, both private and business, has presumed that these increase over the years more or less in line with inflation. Not all assets increase in value. Thus a motor car or computer is usually a depreciating asset.[194] One possible solution in assessing such an asset is to depreciate the value over a suitable number of years and add the depreciation in each year to the deceased's notional provision of support in that year.[195] Once fully depreciated the asset will be removed from the calculation. Alternatively one may take the view that the asset could be sold at any time and converted into some other asset, possibly an appreciating one. There may also be other appreciating assets of which the real rate of return is ploughed back and not consumed by the family, thereby offsetting the depreciation. For larger estates the use value of total assets may conveniently be taken as approximately equal to the real return on the total assets.[196]

[13.5.8] Retirement assets: Once a self-employed person, such as a farmer or shopkeeper, retires the income from the business will cease but the assets will become available as a source of support. It will usually be unrealistic to measure post-retirement income on the basis of the real rate of return on the assets. Part of the assets such as the home and furniture will be consumed to the extent that they are allowed to depreciate.[197] Other assets may be invested in high-income interest bearing investments, such as participation mortgage bonds, with an associated ongoing attrition of the real value of the capital. On the other

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[191] In general see *Santam Insurance v Meredith* 1990 4 SA 265 (Tk) 269. The *Meredith* case unfortunately fails to discuss the extent of the right to support had the death not occurred.

[192] One has in mind here the notional real rate of return if the assets were sold and invested. The balance of the income is attributable to the efforts of the deceased (see paragraphs 12.17.2 to 12.17.4) provided the wife did not assist in the business.

[193] *Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 727-8. See too section 13.10.

[194] In real terms if not in nominal terms.

[195] See paragraph 10.2.5.

[196] A rate of, say, 2,5% py would be applied to the total net assets in the estate. This approach greatly simplifies the calculations and eliminates much speculation on detail whilst achieving some allowance for the use of the assets. See comments by the courts in *Legal Insurance v Botes* 1963 1 SA 608 (A) 617-618.

[197] See paragraph 10.2.5.

hand the income apportioned prior to retirement may include an element of savings which will not be used to provide support until after retirement.[198] Care should be taken not to double count the savings built into the pre-retirement calculation. The assets observable at date of death will thus reflect only part of those that would in the normal course have been available at retirement. Whatever approach is taken as regards asset consumption after retirement, it should bear some sensible relationship to the standard of living enjoyed prior to the death. As a general rule one would assume consumption of capital. A useful rule-of-thumb would be to assume consumption of capital at ½ the rate of inflation. The need for an express opinion in this regard is generally only necessary when the deceased was already approaching retirement age (say within 10 years thereof). There is no general rule that self-employed persons retire fully at 60 or 65, as happens to salaried persons subject to pension fund rules. Even salaried persons may continue employment after retirement, sometimes at a lower rate of pay.

In some cases there may be the prospect that the business or farm would have been sold to a child with provision for regular payments to the parents. Such evidence would obviate the need for rules-of-thumb.

[13.5.9] Adjustment to accelerated benefits:[199] If the widow has inherited and a deduction is to be made for the accelerated benefit[200] then the fact of consumed capital after retirement must be brought into account when calculating the present value of the prospect of inheritance had the death occurred at some other time: The normal calculation assumes that the assets to be inherited will escalate, like future earnings, in line with inflation.[201] If there is reason to believe that after retirement the assets will be consumed in real terms then one must assume a rate of escalation in the future value of the assets at a rate below the rate of inflation. This low escalation rate will give rise to a low present value for the inheritance prospect, and thus an increased deduction for the advantage of acceleration.[202] Conversely her claim for loss of support will have been increased by the assumption of consumed capital.

[13.6] SERVICES IN THE HOME

[13.6.1] Separate claims: If the deceased rendered valuable services to the family, such as car repairs, woodworking, painting, plumbing, the value of these services reflects an addition to the support enjoyed by the family.[203] The most valuable contribution by way of services in the home is usually made by the wife. In the event of her death it is usual to determine compensation on the basis of the cost of replacing her services less the saving from no longer

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[198] *Marine & Trade Insurance v Marimah* 1978 3 SA 480 (A) 488-9.

[199] This topic is discussed more fully at 333.

[200] See 333.

[201] The calculation follows the same lines as a loss of support calculation but with the yearly support payments being replaced with projected value of the assets in the estate and the chance of the deceased's survival being replaced with the chance of his death in the relevant year (see 92).

[202] See 334.

[203] Luntz 'Damages' 2ed 415-16.

having to provide her with support.[204] This approach reflects a perception of a husband who claims not only what he needs for himself but also what he needs for his children.[205] The modern tendency to allow each dependant a separate claim[206] suggests that the value of services should be apportioned amongst the dependants in the same way that other benefits are apportioned.[207] A major objection to a claim based on expenses actually incurred after the death is that most families cannot afford to incur any expense until after compensation has been paid. There is then no award for past loss of services notwithstanding that the family has been deprived of such services.[208] By adding the value of notional services to the overall support before apportionment the dependants are assured of receiving compensation for the past loss of the utility of the services.[209] A further objection to assessing the loss of the wife's services on the basis of the incurred cost of replacement is that the dedicated attention day and night of a caring mother cannot be compared to the services of a hired help. In England the value of a wife's services has been assessed at greater value than the cost of hiring a replacement.[210] This presumes that the claim for the added value of the wife's services is to be viewed as patrimonial. If the benefit is viewed as a form of general damages then it is not permitted under the dependants' action.[211]

[13.6.2] Utilitarian approach: If loss of services in the home were to be compensated on the same basis as loss of support[212] then the value of the services once rendered by the deceased would be apportioned between the family members.[213] The care of children usually takes up a good deal of the mother's time and energy.[214] It is thus appropriate to allow equal shares to parents and children. The services rendered by a father (car repairs, house repairs) tend to be less related to the needs of the children than to the family as a whole and it would be appropriate to use for a father the more usual two-parts-one-part

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[204]'It is possible that the plaintiff may prove that after making allowance for the fact that he no longer has to support his wife, the arrangements necessitated to replace her supervision and assistance in the upbringing of the children entail a pecuniary loss' *Union Government v Warneke* 1911 AD 657 669inf.

[205]*De Vaal v Messing* 1938 TPD 34 38; *Oosthuizen v Stanley* 1938 AD 322 331. Davel 'Skadevergoeding' 48n1 138 views the action for loss of services as separate and distinct from the action for loss of support. See section 11.4.

[206]*Constantia Insurance v Hearne* 1986 3 SA 60 (A); *Ismail v General Accident Insurance* 1989 2 SA 468 (D). See sections 11.4 and 13.6.

[207]eg on a two-parts-one-part basis.

[208]See paragraph 11.3.4.

[209]Luntz 'Damages' 2ed 417 418 prefers the 'loss of utility' approach; so too, it seems, do Cooper-Stephenson & Saunders 'Damages in Canada' 434 436 439n48.

[210]McGregor 'Damages' 14ed 897; Davel 'Skadevergoeding' 140n100; Luntz 'Damages' 2ed 418 419 re similar developments in Canada and the USA. Principle approved in *Wood v Santam Insurance* 1976 2 PH J52 (C); see too unreported judgment cited in *Hendricks v President Insurance* 1993 3 SA 158 (C) 160-1.

[211]Luntz 'Damages' 2ed 420-1; paragraphs 13.1.1 and 13.1.2.

[212]See section 13.8.

[213]Apportionment of the value of services takes place in Australian law if there is no father at the time of the trial (Luntz 'Damages' 2ed 425).

[214]This consideration probably accounts for the traditional limitation of the claim to the period of the children's dependency (*Union Government v Warneke* 1911 AD 657 669inf; *Yorkshire Insurance v Porobic* 1957 1 C&B 90 (A)).

formula. If there are no children then the value of the services would, in the absence of special circumstances, be apportioned equally between husband and wife.

[13.6.3] Substitute services: It has been ruled that the compensation due to the children should not be abated by reason of additional support received from the surviving parent subsequent to the death.[215] This ruling suggests that when assessing compensation for the children on a utility basis no account should be taken of the fact that a father has hired a substitute housekeeper, or remarried.

[13.6.4] Services of grandparents: A deceased grandmother may have rendered services by way of child-minding and housekeeping. By reason of her services the mother would have been able to go out to work and supplement the cash income of the household. The grandmother's death may have brought about a very real pecuniary loss to the family. Compensation will probably be denied on the grounds that the mother of the children is still alive and well and that the grandmother did not provide the services in terms of a duty of support.[216]

[13.6.5] Period of loss: The claim for the loss of a wife's services has traditionally been limited to the period of dependency of the children.[217] This approach overlooks the fact that a wife's services in the home have value to her husband even if there are no children.[218] If the wife did not work, any loss by way of her services will usually be wholly offset by the saving from no longer having to support her. However, where she was working and was largely or wholly self-supporting the husband's loss by way her services in the home may be quite substantial.[219] The assessment of the services rendered in the home by a deceased husband require similar treatment to the services of a wife.

[13.6.6] Deduction for remarriage: The claim for loss of services in the home is subject to a deduction for remarriage if the claim is brought by the surviving spouse.[220] However if the claim for loss of services lies with the children then a deduction for the remarriage prospects of the surviving parent will not be made.[221]

[13.6.7] Anomalous aspects: The value of services in the home needs to be distinguished from cash income and provision of accommodation, transport, food and servants. This arises from the nature of the duty of support: A wife who works and earns sufficient in cash and kind to provide for her own support has no right to claim support from her husband in the

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[215] *Groenewald v Snyders* 1966 3 SA 237 (A) 247.

[216] See reasoning in *Barnes v Union & SWA Insurance* 1977 3 SA 502 (E).

[217] *Union Government v Warneke* 1911 AD 657 669inf; *Yorkshire Insurance v Porobic* 1957 1 C&B 90 (A).

[218] McGregor 'Damages' 14ed 895n29. *Finance Week* 23-29.10.86. 'The work performed by women and men in households is not assigned any economic value; yet this work equals, in monetary terms, a huge proportion of the total amount of wages and salaries paid by all employers in SA'.

[219] Luntz 'Damages' 2ed 417 (*Tong v Purdy*).

[220] *Cooke & Cooke v Maxwell* 1942 SR 133 136; McGregor 'Damages' 14ed 896n37.

[221] *Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D; *Senior v NEG Insurance* 1989 2 SA 136 (W).

event of a separation.[222] A full-time housewife, however, may provide services in the home of substantial value but this, unlike cash earnings, in no way abates her right to claim support from her husband in the event of his leaving home. Davel[223] states that the action for loss of services is separate and distinct from the action for loss of support. There is little doubt that in its traditional form it is anomalous. However one may question Davel's view on the grounds that the claim for both loss of support and for loss of services arises from the wrongful killing of another. What is more the services in issue may be claimed as of a right just as support can be claimed. A plea of *res judicata* may be raised against dependants who seek to claim for loss of services if they have previously finalized a claim for loss of support. Such a plea may not be raised if the loss of services has been caused by an injury to the surviving spouse.[224] The anomaly observed by Davel is more the giving of a right of action to the husband for expenses incurred subsequent to the death. If the value of services were treated on a utility basis as part of the support enjoyed but for the death and apportioned between the dependants then the anomaly disappears.

[13.7] DEDUCTIONS FROM THE DECEASED'S INCOME

The deductions here discussed are those which serve to reduce the support which the deceased would have provided **but for his death**. Deductions by way of compensating advantages are discussed elsewhere.

[13.7.1] Taxation and travel costs: There seems to be unanimity in all common-law jurisdictions that a deduction should be made from the deceased's notional earnings for the taxation that he would have had to pay had he lived.[225]

If the deceased did not live at his place of work then there would be a saving as regards the costs that would have been incurred with travelling to and from work.[226]

[13.7.2] Deceased's own living expenses: Once a person has died the family is spared the cost of his own support. This needs to be deducted before allocating the balance of his income amongst his dependants. There are a number of family expenses which do not fall away when the breadwinner dies.[227] Thus, for instance: the rent for the family home will remain the same; the cost of the housemaid will not reduce. In South Africa the appellate division and has shown preference for allocating such expenses to the deceased on a

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[222]The extent of a right to support can as a rule, only be tested under circumstances of a family divided.

[223]'Skadevergoeding' 48n1 138.

[224]*Evins v Shield Insurance* 1980 2 SA 814 (A); *Erdmann v Santam Insurance* 1985 3 SA 402 (C).

[225]Even in Canada, where no deduction is made for taxation when assessing loss of earning capacity, tax is deducted when assessing loss of support: Cooper-Stephenson & Saunders 'Damages in Canada' 181-95 463-4.

[226]See 152 and 226.

[227]McGregor 'Damages' 14ed 890n81 896n41; Luntz 'Damages' 2ed 412; Cooper-Stephenson & Saunders 'Damages in Canada' 428-9 refer to the 'marginal cost of the expenditures to the deceased', ie the extent to which the presence of the deceased in his lifetime had raised the cost of running the household.

somewhat formal basis, usually with two parts to each parent and one part to each child.[228] This South African approach reflects the utility prior to the death of the breadwinner's share of the overall cost of maintaining the family unit, including himself.

[13.7.3] Maintenance provided in absence of duty to do so: In general the extent of the support enjoyed by dependants is a question of fact. It is not enough to establish that the deceased had a duty to provide support and the means to provide it.[229] It must also be established that the deceased would have provided support in pursuance of this duty. **It follows that if the deceased would regularly have applied his income to expenditures not for the benefit of his dependants then the income available for the support of the dependants should be reduced.**[230] An important consideration would be the likely continuance of the expenditure in the future. In one instance the court found that the deceased had been making payments to his mother in Italy without having a duty to do so. The notional income available for the support of the dependants was reduced by these payments.[231] Likewise, it seems, payments of support to an ex-wife should be deducted despite there being no common-law duty to make such payments. The provision of support to stepchildren would also seem to be deductible.[232] Further such deductible items are now discussed:

[13.7.4] More than one wife: For women married by polygamous customary union there is a statutory directive that compensation for two or more wives be limited to what would have been payable had there been only one wife.[233] The proper approach to the children's claims is not quite clear. The one-wife share would be apportioned equitably between the widows. The simplest method is to apportion equally between the two or more widows the two parts of family income normally allocated to a single widow.[234] With three widows this would mean allocating two thirds of a part to each widow. The children would then be allocated one part each. This may well lead to overcompensation for the children, but since the widows are probably undercompensated the defendant has little to complain about.

[13.7.5] Hindu and Moslem marriages: The wife or wives of marriages concluded by Hindu or Moslem rites will have a contractual right to support while the common household

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[228]*Legal Insurance v Botes* 1963 1 SA 608 (A) 616B-F (rental value of flat); *Nochomowitz v Santam Insurance* 1972 3 SA 640 (A) 647-9 (suggested that two servants be reduced to one). The finding in *Maasberg v Hunt Leuchars & Hepburn* 1944 WLD 2 15 in favour of allowance for indivisible expenses does not reflect good law in South Africa; see too Davel 'Skadevergoeding' 110-11.

[229]See paragraph 13.2.1.

[230]See paragraph 13.4.4.

[231]*Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) (both the mother of the deceased and the mother of the wife had derived benefit from the deceased's income).

[232]See paragraph 13.2.13.

[233]s31 of Black Laws Amendment Act 76 of 1963.

[234]See section 13.8.

lasts.[235] For this reason it seems correct that a deduction be made for the expenses of their keep.

[13.7.6] Further children and further wives: For a young family there will be the prospect of further children and a deduction needs to be made for the notional costs of keeping these children.[236] For potentially polygamous marriages there is the prospect that the deceased may also have taken a further wife, or wives. Allowance for this consideration would be done on the basis of the value of the chance and may well be brought into account under the deduction for general contingencies.[237]

[13.7.7] 'Common-law wife': When a man and a woman choose to live together as man and wife but without the sanction of a formal ceremony, civil or sacred, it is usual to speak of a 'common-law wife'.[238] The act of setting up a common household and the manner of its management will in the normal course of events give rise to a contract, express or implied, governing the relationship between the parties as to provision of support, services, etc. This contractual right to support from the deceased would justify making a deduction for the expenses of keeping the 'common-law wife' notwithstanding that she has no claim for damages for loss of support.[239] The increasing prevalence of such relationships may lead in time to the granting of a right of action to the 'widow'.

[13.7.8] Gratuitous support: In *Buthelezi*'s case[240] the support provided to waifs taken in from the street was viewed as charitable and thus to be ignored in assessing the damages for the legitimate children of the deceased. This principle suggests that the support provided to a 'common-law wife' should be similarly treated. However, the provision of support to the mother of a man's children is provided in terms of strong moral, if not contractual, obligation. Even without bearing children the 'common-law wife' will usually have rendered valuable services in the home for which her support may be viewed as a *quid pro quo*. The relationship between the deceased and his 'common-law wife' would not have been without benefits for the deceased. It seems inappropriate to describe support provided under such circumstances as 'charitable'.[241]

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[235]See, for example, *Ismail v Ismail* 1983 1 SA 1006 (A).

[236]*Chisholm v ERPM* 1909 TH 297 301inf; *Burns v NEG Insurance* 1988 3 SA 355 (C) 362G; *Milns v Protea Assurance* 1978 3 SA 1006 (C) 1010-11; Davel 'Skadevergoeding' 91 98 111n753. Roughly 2 children per white woman, 3 per coloured woman, and 5 per black woman (see 'Demographic Trends' 81-103). This may be done explicitly in the actuarial calculation.

[237]Black custom frowns upon the remarriage of a widow (Seymour 'Customary Law' 5ed 286-94).

[238]The expression is misleading in that the law does not give recognition to such a *de facto* marriage, if marriage it can be called. The 'wife' of such a relationship is also known as a 'houvrou'.

[239]See 292. McGregor 'Damages' 14ed 893-4 discusses an English ruling where the cost of supporting a common-law wife was deducted when assessing the damages for the children. See too Luntz 'Damages' 2ed 413n4. The deduction made by the English and Australian courts has regard to indivisible household expenses (see paragraph 13.7.2 above).

[240]*President Versekeringsmpy v Buthelezi* 1977 1 PH J26 (A).

[241]In *Munarin v Peri-Urban Areas Health Board* 1965 1 SA 545 (W) 556 the court deducted gratuitous payments to the deceased's mother and mother-in-law. There seems to have been some sort of contractual undertaking to support the mother-in-law who shared the common household. The deceased's mother in Italy was provided with payments

[13.7.9] Charity: Expenditure on a charitable cause will generally form part of the support provided to the family.[242] Not the least reason for this consideration is that the relevant financial resources could at any time be diverted to other forms of expenditure for the benefit of the family. In *Buthelezi*'s case the family had taken in a number of needy children. The family income was apportioned amongst the natural children of the deceased. Care needs to be exercised when dealing with black family relationships because the relevant customary law may have created a contractual or moral obligation to provide the relevant support under circumstances where the Roman-Dutch law imposes no such obligation.[243]

[13.7.10] Pension deductions and insurance premiums: If the deceased contributed to a pension fund it is usual to deduct the relevant contribution from current income, and then to add back the value of the notional pension which would have accrued on normal retirement.[244] It has been suggested that by reason of the Assessment of Damages Act[245] a like deduction should be made for life insurance premiums.[246] If such a deduction were to be made, by analogy with pension benefits, then there should be added back the present value of the benefits when the policies eventually mature.[247] Prior to the passing of the Assessment of Damages Act it was ruled that no deduction should be made for life insurance premiums.[248] This, it seems, continues to be the practice. Pension-fund deductions from salary are compulsory, a condition of service. Life insurance premiums are discretionary savings which could be diverted to other purposes at any point in time. When interpreting the Assessment of Damages Act considerations of fairness do not play a major role.[249]

[13.7.11] Savings: It has been suggested that a deduction be made for that part of the deceased's income which would have been saved and thus not applied to the support of the family.[250] Savings, however, reflect discretionary spending capacity. Savings may be used in the long term to finance old age or to provide continued support after the premature death of the breadwinner. In the shorter term savings may be spent at any time by, for example, purchasing a new car or a swimming pool or upgrading the family home. By increasing the family's assets the value of the usufruct of the assets is increased. It is clear that the ability

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now and again, and such payments seemed likely to continue until her death.

[242]*President Versekeringsmpy v Buthelezi* 1977 1 PH J26 (A).

[243]eg the *ukungena* relationship whereby a brother or nearest male relative of the deceased must take over responsibility for the wives of the deceased (Seymour 'Customary Law' 286-94). See too *Kewana v Santam Insurance* 1993 (Tk) (unreported 28.02.93 case 112/88) for adoption by customary law.

[244]See, for example, *Dippenaar v Shield Insurance* 1979 2 SA 904 (A).

[245]9 of 1969.

[246]Newdigate & Honey 'MVA Handbook' 180; Davel 'Broodwinner' 535-6 575; Reinecke 1976 *TSAR* 26 54.

[247]The majority of policies sold these days are endowments. A life policy or term policy provides no benefit during the lifetime of the breadwinner.

[248]*Groenewald v Snyders* 1966 3 SA 237 (A) 247-8.

[249]See, for instance the anomalous result in *Du Toit v General Accident Insurance* 1988 3 SA 75 (D). The widow was compensated for the loss of her husband's pension notwithstanding that as a widow she had become entitled to 80% of that pension from the same source.

[250]Davel 'Skadevergoeding' 110n748.

to save may ensure a better standard of living in future years or a greater security for the prevailing standard of living. Savings imply improved inheritance prospects for the dependants. It follows from the above considerations that it will be rare indeed to find a deduction being made for savings.[251]

[13.7.12] Wife's income: It has been suggested that a wife may work and keep her earnings without any obligation to contribute to the support of herself or the family.[252] All support is provided by her husband. The Matrimonial Property Act[253] now makes it compulsory for a wife to contribute to household expenses pro-rata her means.[254] Quite part from this legislation, for the reasons set out in the previous paragraph it would be rare indeed that a wife's earnings were not completely or partially applied to the benefit of the family either by way of savings or by providing luxuries such as overseas travel or a swimming pool or tertiary education for the children, things which would not have been possible on the husband's income alone. In *Yorkshire Insurance v Porobic*[255] it was accepted that the entire combined income of husband and wife had been applied to the support of the family. It is conceivable that a wife may utilise her earnings for the support of her parents or donate her earnings to a charitable cause.[256]

[13.7.13] Expensive hobbies: The evidence may reveal that the deceased engaged in an expensive interest to the exclusion of his family, eg yachting, big-game hunting, irresponsible business speculation, gambling or keeping a mistress. It would be appropriate to exclude such expenditure from the deceased's earnings to the extent that the self-indulgence was likely to persist in the future to the detriment of the family support. The earnings of a wife might likewise be applied to selfish ends such as overseas travel for herself alone.

[13.7.14] Insolvent breadwinner: An insolvent breadwinner, that is to say one whose liabilities exceeded his assets shortly before he died, would, had he lived, have had to apply part of his income to servicing and reducing his debt. It follows that the income available for the support of his dependants should be reduced to allow for this. The extent of the net indebtedness would normally be determined by reference to the deceased's estate after exclusion of life insurance benefits. If insolvency proceedings seem likely then he may be

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[251]*Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A) (compensation based on full income from business notwithstanding drawings at very much lower level). See too McGregor 'Damages' 14ed 877; Cooper-Stephenson & Saunders 'Damages in Canada' 440-2.

[252]Davel 'Skadevergoeding' 138-9; *Milns v Protea Assurance* 1978 3 SA 1006 (C) 1012. Section 3 of Matrimonial Affairs Act 37 of 1953 reads 'A husband and wife married out of community of property shall be liable jointly and severally for all debts incurred by either spouse in respect of necessaries for the joint household: Provided that if the wife pays any such debts or part thereof, she shall have a right of recourse against the husband for the full amount paid by her'. It is unclear whether this section records a pre-existing perception of the law of whether it has created the view expressed by Davel. Suffice it to say that the section has now been repealed (see next footnote).

[253]88 of 1984 s23 as regards marriages out of community of property.

[254]For a wife married in community of property her earnings are pooled with those of her husband.

[255]1957 1 C&B 90 (A) 94 'the fact that the necessity persisted for such a long time rather suggests that this may have been a family, like so many others, in which the whole of the income was consumed by the cost of living'.

[256]See paragraph 13.7.3.

relieved of such obligations and his earnings protected from his creditors because they are entirely needed for the support of his family.

[13.8] APPORTIONMENT OF FAMILY INCOME

[13.8.1] Family income defined: The financial resources available for supporting the family include the combined net earnings of husband and wife plus the yearly value of the use of assets. The assessment of damages for loss of support is concerned with what have been provided had the death **not** occurred. 'Family income' is thus not so much a question of what has been provided in the past but rather what would have been provided in the future, had the deceased lived. Where the calculation is to be based on the earnings of the deceased the court may have regard to his earning capacity in lieu of explicit evidence of what was being earned at the time of the death.[257] A similar approach is appropriate as regards the earnings of the wife. In those instances where she was unemployed at the time of the death there may have been a substantial chance that she would have taken up employment in time to come.

The discussion below begins with the situation where only one spouse would have worked during the subsistence of the marriage. The assessment problems created by the earning capacity of the surviving spouse are discussed subsequently.[258]

The value of services in the home are excluded from this part of the calculation because it is subject to different considerations as regards apportionment.[259]

The share of family income to be apportioned to each family member is, in theory, a question of fact to be determined from the evidence. In practice families do not keep meticulous financial records as to the past allocation of resources. The court is often driven to doing the best it can with scanty or non-existent evidence.

[13.8.2] Two-parts-one-part method: In order to fill this evidential void reliance is often placed upon a formalism of calculation whereby two parts are allocated to each parent and one part to each child.[260] As each child becomes self-supporting the available income is reallocated amongst the remaining family members until a time is reached when all children have notionally left home and the husband and wife enjoy the family income in equal shares. Whether this formalism is an actuarial invention or a product of the maintenance courts we cannot tell. It is, however, in widespread use for purposes of resolving disputes as to the allocation of family income. It is not, however, a rule of law and the courts have no obligation to abide by such an apportionment of family income.[261]

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[257] *Lebona v President Versekeringsmpy* 1991 3 SA 395 (W) 401-2; *Van Staden v President Versekeringsmpy* 1990 4 C&B L2-1 (W). See discussion of earning capacity at 213 and likely earnings at 235.

[258] See 308.

[259] See section 13.6.

[260] Davel 'Skadevergoeding' 110-11.

[261] In *Van Heerden v Bethlehem Town Council* 1936 OPD 115 the two-parts-one-part approach is described as being more fair than the other alternative proposed to the court.

[13.8.3] A convenient approximation: The allocation of two parts for each adult and one part for each child has an intuitive appeal although its correspondence with the realities is questionable. An attempt to introduce a more sophisticated apportionment model has been rejected in favour of maintaining simplicity of calculation.[262] Quite clearly parents will benefit more from savings than their children. Children may well eat as much if not more than adults. Adults, however, will have greater say in the allocation of resources, particularly discretionary spending at an hedonistic level.

[13.8.4] Numerical example 1: Consider a family comprising a father, a mother and two children. Assume for the moment that only the father works and that his earnings, net after deductions, available for the support of the family is R90000 per year. If two parts are allocated to each adult and one part to each child this income will need to be split 6 ways with R30000 per year per adult (two parts) and R15000 per year per child (one part). These amounts would be escalated after the death to allow for the deceased's notional salary increases and reduced for the chance that he may have died in any event.[263] The apportionment calculation would be repeated for each separate year after the death. When the oldest child notionally becomes self-supporting[264] the available income will then need to be split only 5 ways. This means a larger share for each of the remaining family members. If we assume, for sake of the discussion, that there has been no inflation then the deceased's income will still be R90000 per year. Each parent will then be allocated R36000 per year (two parts) and the remaining child R18000 per year (one part). After the second child has become notionally self-supporting, the deceased's notional income of R90000 per year is notionally divided equally between himself and his 'wife' with R45000 per year being allocated to the 'wife'. The word 'wife' is used here rather than the word 'widow' because we are here concerned with what support would have been provided had there been no death. This usage will be continued in the pages below.

[13.8.5] Presumption of common household: As a general rule the two-parts-one-part method of apportionment should only be used when the deceased shared a common household with his family. The relevance of the formalism to migrant workers who spend much time away from home is questionable. Nevertheless, the general absence of suitable evidence usually leads to a use of the two-parts-one-part approach.

[13.8.6] Single-parent families: The two-parts-one-part formalism is adaptable to non-standard family relationships: Thus a single divorced parent has been allocated three parts of his income with one part to each child.[265] The increased allocation to the parent may be justified on grounds of possible remarriage or hedonistic excesses at the expense of the children. But there is certainly no fixed rule that a single parent should be allocated three parts. For single parents living close to the breadline an allocation of two parts is usually more appropriate.

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[262] *Snyders v Groenewald* 1966 3 SA 785 (C) 789H.

[263] For the widow the calculation would include adjustments for the contingency of her early death.

[264] Or marries or dies.

[265] *Van Aardt v Southern Versekerings-Assosiasie* 1986 (O) (unreported 27.2.86 case 523/82).

[13.8.7] Dependent grandparents: The single-parent family of limited means commonly shares resources with the grandparents of the children in a common household. The grandparents will often enjoy modest incomes from pensions or employment. If the single parent has been killed and damages need to be assessed it is quite often appropriate to aggregate all incomes and then allocate one part of this total to each child and grandparent and two parts to the deceased.[266] Where the mother of the deceased filled the functions of a wife in the home it may be appropriate to allocate to her two parts. The dependency of a grandparent would then be the difference between the one-part, or two-part, share and that grandparent's income. If the grandparent's income exceeded the one-part, or two-part, share this would indicate that there would have been no dependency in the year to which that calculation relates.

[13.8.8] Lower-income household finances: A child who has gone out to work may continue to live at home pending marriage. In communities with limited financial resources it is common that all working members of the family pay over part or all of their pay packets to the mother of the house.[267] She then pays the bills for general overheads such as rent, telephone, food, and gives pocket money to the various family members. Working members of the family will have greater say in extracting pocket money from the mother of the house or may refrain from paying over their full pay packet. Such situations are probably best analyzed by allocating two parts to each working member of the family and the mother of the house and one part to each of the others. Allowance will usually be made for the notional marriage of the deceased at a time a few years after the death, depending on the evidence. The chance of marriage will usually diminish as the child grows older. For a single child over the age of 30 one would probably assume permanent residence with the parents subject to a substantial contingency deduction for the chance of marriage or leaving home. In poorer communities one finds that a younger child will bring his new wife to live at the home of his aging parents who will provide babysitting and housekeeping services.[268] This will permit the new wife to take employment and thereby pay for her own keep.

[13.8.9] Employment benefits not shared with family: The migrant-labour system in South Africa prevents fathers and mothers from working near home.[269] The remuneration package of a migrant labourer frequently includes benefits in kind by way of board and lodging and medical care. The family did not share in these benefits in kind but did gain financially in that the deceased had no major living expenses and was thus, in theory at least, able to send home a substantial proportion of his income.[270] The value of benefits in kind can be a large proportion of the deceased's earnings. The normal two-parts-one-part method of apportionment applied to the total remuneration package can produce absurd results when there are many children. The father's two-part share is then often less than the value of the

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[266]One assumes that aged parents will have little control over the allocation of funds and also be less active socially. In practice there may be extra costs for care and medication.

[267]'The wages of adolescent children are often used to budget for household expenses' HSRC 'Marriage & Family Life' 99.

[268]Based on claims handled by my office.

[269]This phenomenon is expected to continue in post-apartheid South Africa ('Land Reform' 42).

[270]Whether he actually did so is generally very difficult to ascertain.

board and lodging and medical treatment provided to him alone by his employer. To avoid this incongruity one needs to apportion only the cash earnings but allocate to the deceased less than two parts of his cash income to allow for the saving in his living expenses. It would be preferable to have explicit evidence as to the application of the deceased's income. Such evidence is usually extremely difficult to obtain.

[13.8.10] Lobola money: A young black man, without children and working far from home, may send his money home to his parents.[271] Care needs to be exercised with interpreting such payments for these are not always by way of support. The father, and sometimes the mother, has a moral duty to provide the son with the bride price.[272] The payments may well be directed towards savings for *lobola* rather than parental support. There may also be substantial doubts as to the continuance of such payments over an extended period in the future.

[13.8.11] Support for illegitimate children: For single women with children one will usually assume that they will remain single without further children. Should such a woman be killed her history may suggest the likelihood of further children notwithstanding the absence of a formal husband. For single black mothers it is rare to find a contribution to support by the father of the child.[273]

[13.8.12] Direct evidence of maintenance payments: The use of a two-parts-one-part division is, strictly speaking, only valid when all dependants live together with the breadwinner in a common home. For migrant workers evidence should always be provided as to the extent to which the deceased sent money home for his family. In practice it is extremely difficult to get such evidence and it is usual to rely on a two-parts-one-part division of the deceased's earnings. This is not to say that where evidence is available it need not be adduced. The deceased may have been providing maintenance for illegitimate children or children of a previous marriage. It is then often possible to produce a copy of the divorce order or the order of a maintenance court. Evidence of unofficial payments is usually brought by way of affidavit. It is usual that formal cash payments are supplemented by informal expenditure on food, clothing and recreation.

It is usually reasonable to assume that the earnings of the deceased would in future have escalated more or less in line with inflation. With maintenance payments this presumption is not so obviously valid. The fact of inflation, or an increase in salary, is on its own not

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[271]Judging by claims submitted to my office this is a fairly common occurrence.

[272]Usually for the first wife only: Seymour 'Customary Law' 5ed 160-3. Fairly complex family property arrangements are found for meeting the cost of lobola (Seymour 'Customary Law' 5ed 77-80): 'A family head is entitled to allot one or more cattle of a house to a son of the house'.

[273]'African Customary Law' Burman 36-51. Under black customary law the child belongs to the house of the mother. The unmarried mother falls under the authority of her father. But since the child does not belong to the house of his father, the father has, under customary law, no claim to the child nor a duty of support. The father of the child may acquire custody of the child, and the duty of support, by paying over the *isondlo* beast (Seymour 'Customary Law' 5ed 230-4). This absolves the family of the mother from providing further support. 29 death claims in my office files for single black females revealed not one single instance where support by the father of the children was reported. Non-disclosure is unlikely because in none of these instances were the children assisted by their father with bringing the action for loss of support.

sufficient to justify an increase in maintenance payments.[274] The crucial question is 'Had there been no death would the maintenance payments have been increased, and if so to what extent?' It is common that after the death an application for increased maintenance is brought against the deceased's estate. This, however, does nothing to prove what would have been provided had there been no death. In general escalation in line with inflation would be assumed if there had been an active interest by the deceased in his dependants. On the other hand where the deceased has been irregular with maintenance payments one might assume not only no increases but also a large deduction for the contingency that the irregularity would have continued in future years, even to the point of cessation of payments.

The fact of a right to support does not imply that right has a value. The evidence must indicate at least the value of a chance that maintenance would have been provided in terms of that right.

[13.8.13] Services in the home: The considerations governing the apportionment of services rendered in the home by the deceased have already been discussed.[275]

[13.9] THE WORKING WIFE

[13.9.1] Self-supporting to extent of her own income: There is an increasing tendency for married women to go out to work.[276] The traditional family model of the breadwinner husband at work and the housewife at home is being displaced under pressures to maintain or improve standards of living in the face of taxation, inflation, and increasing job insecurity for husbands. By reason of these earnings the wife becomes partially or wholly self-supporting. If she becomes fully self-supporting then she ceases to have a right to claim support from her husband:

> 'No maintenance will be awarded to a wife who is able to support herself'.[277]

If she becomes partly self-supporting then her right to claim support from her husband is restricted to the difference between her net earnings and the cost of her support:

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[274]For a divorced wife inflation is but one of the factors to be taken into account (*KBI v Steyn* 1992 1 SA 110 (A); Robinson 1992 *THRHR* 489). In *Levin v Levin* 1984 2 SA 298 (C) the fact of inflation alone was held sufficient grounds for increasing maintenance under circumstances where high rates of inflation had not been in the contemplation of the parties when the original divorce order was negotiated. In *Green v Green* 1976 3 SA 316 (RAD) the court distinguished maintenance orders for children from maintenance orders for divorced wives and allowed an increase in the child's maintenance on the grounds of inflation alone. In *Erasmus v Booyse* 1963 1 PH B4 (C)12 the court ordered the father to pay maintenance at the rate of 11% of his gross monthly income per month per child. This ensured that maintenance payments increased in line with his salary.

[275]See section 13.6.

[276]HSRC 'Marriage & Family Life' 318: In 1960 19,4% of married white women were economically active. In 1980 this proportion had increased to 36,6%. The equivalent figures reported for other racial groups were: Asians 3,6% in 1960 and 19,4% in 1980; coloureds 23,2% in 1960 and 36,2% in 1980; blacks 15,6% in 1960 and 31,8% in 1980. The figures for blacks reflect registered marriages only and do not include the "independent" homelands; the figures thus reflect the norms for a largely urbanized population. HSRC Register of Graduates communication 21 reports that in 1980 60% of married white female graduates were economically active. The equivalent figures for other races were: Asians 74%; coloureds 81%. No figure is reported for blacks.

[277]Hahlo 'Husband & wife' 5ed 361. Boberg 'Persons & family' 338n44 'This is simply an application of the general principle that no person who can support himself is entitled to claim support from another'.

> 'If, however, the husband's income is insufficient to provide the necessary support the wife would go out and work in order to supplement his income. In these circumstances if the husband is killed the value of the right lost by the wife through his death would not be the value of one half of his income, but the value of what he contributed towards her support. ... (in other words) how much of the deceased's income would have been devoted to his wife's support had he not been killed'.[278]

If she ceases to earn an income her right to claim support will revive. Conversely a husband may become dependent on his wife when he is unemployed or retired.

[13.9.2] Numerical example 2: Consider a family comprising a husband and a wife, but no children. Suppose that both husband and wife are employed with the husband earning R60000 per year net of deductions and the wife earning R30000 per year net of deductions. The total income available for their joint support is thus R90000 per year. If this is allocated in equal shares to husband and wife then the total cost of maintaining the wife is R45000 per year. Of this amount she contributes R30000 per year and the husband R15000 per year. If the husband were to be wrongfully killed her claim for damages would be for a loss of support of R15000 per year, this being the support that she would have received had her husband lived. Had she been wrongfully killed her husband would not have had a claim for loss of support.

It deserves note that the calculation focuses upon what she would have earned had the husband not been killed. After the death she may elect to stop work or to take on higher paid employment. These factors will, it seems, be treated as *res inter alios acta* in so far as her loss of support claim is concerned.[279] She may, however, have a separate right of action for loss of earnings due to personal injury.[280]

[13.9.3] The support of children: The general principle observed above is that the income of a wife is applied first to her own support. Only if her own income is insufficient is she entitled to look to her husband for additional support. The same principle applies as regards the income of a child:

> 'In accordance with the general principles applicable to all duties of support, no obligation rests upon a parent who, whether by reason of indigence, ill-health or otherwise, is unable to discharge it. Likewise, a child who has the means to support himself cannot require his parents to do so; they are entitled to apply the child's income to his maintenance before using their own resources for this purpose'.[281]

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[278]*Milns v Protea Assurance* 1978 3 SA 1006 (C) 1012-13. See too *Van der Merwe v Pearl Assurance* 1967 2 PH J31 (A); *Lebona v President Insurance* 1991 3 SA 395 (W) 399-400; Luntz 'Damages' 2ed 416 448.

[279]See section 13.10.

[280]See section 13.10.

[281]Boberg 'Persons & family' 261. See paragraph 13.2.8.

The general principle is that each parent owes a duty of support to the children **in accordance with his or her means.**[282] The incidence of the duty of support is not affected by whether the parties are married in or out of community of property.[283] If one parent has made too large a contribution towards the support of the children then that parent has a right to recover the excess from the other parent.[284]

[13.9.4] Statutory and common-law rights of recourse: The Matrimonial Property Act[285] provides for a right of recovery, in certain circumstances, by one spouse from another for expenditure on household necessaries. For marriages out of community of property after the commencement of the Act a right of recourse is not automatic, but one may have been stipulated in the antenuptial contract. The Matrimonial Property Act[286] does not apply to persons who are divorced. Such persons nonetheless have a common-law right of recourse for excess expenditure on the support of the children.[287] It is doubtful that the common-law right of recourse of a married person as regards excess expenditure on children is co-extensive with the statutory right to recover excess payments as regards household necessaries,[288] although the two rights of action do seem to overlap in many instances.

[13.9.5] Joint and several liability of parents: The primary significance of the right of recourse between the parents is that it reflects their joint and several liability as regards the children.[289] A child may thus look to either parent for support. That parent may then recover a contribution from the other parent. Only if a parent has only sufficient for his or her own support, and is unable to raise the additional funds by work or liquidation of assets, will that parent be relieved[290] of the duty to provide support.[291] A court order that one

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[282]There is copious authority for this proposition. See, for instance, *Arendse v Maher* 1936 TPD 162; *Plotkin v Western Assurance* 1955 2 SA 385 (W) 394-5; *Senior v NEG Insurance* 1989 2 SA 136 (W) 141F; Hahlo 'Husband & wife' 5ed 134; Boberg 'Persons & Family' 254 408; Spiro 'Parent & child' 3ed 368.

[283]*Plotkin v Western Assurance Co Ltd* 1955 2 SA 385 (W) 395C-D. See too footnote 324.

[284]*Farrell v Hankey* 1921 TPD 590; *Woodhead v Woodhead* 1955 3 SA 138 (SR); Boberg 'Persons & family' 257 266; Hahlo 'Husband & wife' 414-15.

[285]s23 of Act 88 of 1984 provides for a right of recourse between spouses for household necessaries provided such marriage was out of community of property and concluded before the commencement of the Act (subsection (3)). There is, however, no automatic right of recourse, other than by prior agreement, for marriages concluded after the commencement of the Act. For marriages in community of property there is a pooling of funds and thus an automatic and immediate adjustment for excess contributions.

[286]88 of 1984.

[287]See footnote 284.

[288]Boberg 'Persons & family' 276n7 'The fact that a man is not obliged to support his stepchildren does not, however, prevent his being liable for household necessaries purchased by his wife on their behalf, provided they share a joint household with him and his wife'; *Clerk & Co v Lynch* 1963 1 SA 183 (N) 186D-F.

[289]Hahlo 'Husband & wife' 5ed 415 'In the absence of an order of court the principles governing joint liabilities apply. A spouse who has contributed more than his or her share has a right of recourse pro tanto against the other spouse'.

[290]Spiro 'Parent & child' 3ed 371n2 remarks that 'The father is here not relieved of his duty, in the premises he has no duty'.

parent pay maintenance for a child to the other parent operates between the parents and not between the parent and the child.[292] It follows that the direct provision of benefits to the child in cash or in kind do not justify an immediate reduction in maintenance payments for the child, unless such reduction has been sanctioned by the court.[293] The payments of maintenance for a child are, however, to be distinguished from a right of recourse.[294] An agreement to pay maintenance for a child is a *stipulatio alteri* whereas a right of recourse does not have regard to needs of the child. A court order for maintenance for a child is often expensive and time consuming to obtain.[295] For this reason an order to pay maintenance will be made even though at the time it is made the relevant parent has no means.[296] The order does not mean that a resourceless person has a duty to support a child but rather that the court expects that there will in time be resources from which a contribution may justifiably be expected.

[13.9.6] In accordance with his or her 'means': In order that a right of recourse be exercised it is necessary to establish what contribution each parent is obliged to make. The guiding principle is that each must contribute 'in accordance with his or her means'.[297] This expression is capable of a variety of interpretations: The most simplistic is that each parent must contribute 'pro-rata his or her total income'.[298] Most judgments, however, have regard to surplus income after deduction of various expenses and deductions.[299] In

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[291]*Ncubu v NEG Insurance* 1988 2 SA 190 (N) 196B 'From all this it is clear that, aside from the bare necessities of life, a parent is not liable to provide any particular aspect of maintenance, even if he is able to afford it, unless the circumstances of *inter alia* the parent justify it. If that is so, then *a fortiori* if the parent is financially unable to provide any aspect of maintenance required by the child, then he is under no obligation to do so. It seems to me that the probable reason why the old writers, and indeed the new, do not say this expressly, is because they assume it to be understood by all'. Spiro 'Parent & child' 3ed 368 'If parents do not earn at all **or earn only enough to support themselves** they must resort to any capital they possess' (emphasis supplied). The point of citing this passage is that if the parent has no capital and only sufficient income for his own support, then there is no duty of support. This conclusion follows from the consideration that the duty of support between parent and child is reciprocal. The child's right to claim support from a parent is limited by the parent's reciprocal right to claim support from the child.

[292]Hahlo 'Husband & wife' 5ed 414 'A maintenance order determines the liability of the spouses inter se. It is not binding on the child'.

[293]*R v Glasser* 1944 EDL 227. More generally see Hahlo 'Husband & wife' 5ed 414-15.

[294]Hahlo 'Husband & wife' 5ed 'Where the non-custodian spouse has a right of recourse, he cannot set it off against the maintenance which he has to pay to the custodian spouse, for maintenance is paid in the interests of the children, whereas the right of recourse lies against the custodian spouse personally'. Otherwise stated, an agreement between the father and mother for the payment of maintenance in respect of a child 'is an agreement between them for the benefit of a third party, their minor child' (*R v Glasser* 1944 EDL 227 231).

[295]See comments in *Erasmus v Booyse* 1963 1 PH B4 (C).

[296]See, for instance, *Lamb v Sack* 1974 2 SA 670 (T) 673-4 where a mother was ordered to provide maintenance for a child despite a finding by the court that she was 'without means'. See too *Lebona v President Insurance* 1991 3 SA 395 (W) 403B-C.

[297]See footnote 282.

[298]This was the approach adopted by the magistrate which was taken on appeal in *Zimelka v Zimelka* 1990 4 SA 303 (W) 305-6.

[299]*Lamb v Sack* 1974 2 SA 670 (T) 674 had regard to the father's income net 'after making allowance for his monthly expenses'; the estimated income of the mother, were she to find employment, was presumably determined on the

general the allocation of the burden of support for children is not an exact science, that is to say it is subject to the discretion of the judge.[300] It follows that a court will have regard to the equities of the situation when exercising this discretion.

[13.9.7] Pro-rata contributions by spouses: The Matrimonial Property Act[301] lays down that spouses married out of community of property are obliged to contribute to household expenses 'pro-rata' their respective 'means'. Considerations relevant to the interpretation of this provision are:

* Earlier legislation used the word 'income' in lieu of the word 'means'.[302] The two words are not synonymous in meaning, although 'means' undoubtedly includes 'income', or at least what remains after deduction of normal expenses.
* The Act is concerned with the contribution to be made to the overall household expenses, not the particular costs of the children of the marriage. The directive applies equally to childless marriages where the mother's pro-rata contribution is directed entirely at covering her own living expenses. With damages calculations it is usual to assume that the entire net incomes of husband and wife are consumed with supporting the family.[303] This assumption gives full effect to the Act.

The 'means' of a parent will include assets.[304] That is to say a parent is obliged to use both income and assets in order to provide proper support for the children. If a parent has major financial commitments, such as bond repayments or pension fund contributions, the parent's income will be reduced by these charges.[305] By reason of the reciprocal duty of support between parent and child, a parent should be left with sufficient income for his or her own support.[306] In other words a child cannot expect so high a standard of living at a parent's expense that the parent is rendered destitute. In general the overall standard of living of the family, that is to say of both parents and children, must be reduced to fit within the available income and other means. This last point deserves closer consideration where father and mother are divorced or never married, and live separately:

[13.9.8] Unfair treatment of mothers: Consider a divorced mother who earns a R20000 per year net after tax and other deductions. The father of the child lives separately and earns

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same basis of that of the father, that is to say net after monthly expenses. 'Monthly expenses' presumably included the normal costs of each parent's own support (see footnote 67). For a discussion of *Woodhead v Woodhead* 1955 3 SA 138 (SR) see footnote 68. See too *Harwood v Harwood* 1976 4 SA 586 (C).

[300]Just as an award for damages for loss of support is subject to a wide discretion (see 37). In *Bordihn v Bordihn* 1956 2 PH B32 (A) it was held as regards an order for maintenance that the approach of the appeal court, when asked to interfere with the estimate of the trial judge, should be along the lines adopted in compensation cases.

[301]88 of 1984 s23.

[302]Matrimonial Affairs Act 37 of 1953 s3 as amended; see Boberg 'Persons & family' 209-10.

[303]See paragraphs 13.7.11 and 13.7.12.

[304]Spiro 'Parent & child' 3ed 368; Boberg 'Persons & family' 260n50; Hahlo 'Husband & wife' 5ed 135n49.

[305]See, for instance, *Harwood v Harwood* 1976 4 SA 586 (C).

[306]See footnote 291.

R80000 per year net after tax and deductions. Neither parent has any assets of consequence. If the cost of supporting the child is R20000 per year to what extent should each parent contribute? A pro-rata approach based on the incomes of each parent would require a contribution of R2000 per year from the mother and R18000 per year from the father. The father is then left with R62000 per year for his own support and the mother R18000 per year for her support. But, one may ask, why in these circumstances should the mother make any contribution at all? Why should she forfeit R2000 per year from her meagre income when her ex-husband has a lifestyle based on R62000 per year? This problem in equity does not seem, as yet, to have been properly addressed by the courts.[307]

[13.9.9] Numerical example 3 (method A): Consider a family comprising a husband, a wife and two dependent children. Suppose that both husband and wife are employed with the husband earning R60000 per year net of deductions and the wife R30000 per year net of deductions. The total income available for the support of the family is thus R90000 per year. If this total is allocated with two parts to each adult and one part to each child, a parent's share is R30000 per year (two parts) and a child's share is R15000 per year (one part).[308] But these are shares of the total. If the father has been wrongfully killed, and damages for loss of support are to be calculated, to what extent is the father's income to be allocated to his wife, and separately to the children? The previous analysis of the right to support of a wife who has no children[309] has indicated that the wife only has a right to claim support from her husband if her own earnings are insufficient to cover the cost of her support. In the present example the cost of the wife's support is *ex hypothesi* R30000 per year. She earns R30000 per year. Her own claim for loss of support for the year in question is thus nil. However, by reason of the death of the father the family has lost R60000 per year of which R30000 per year was applied to the cost of his own support. The balance of R30000 per year is appropriately allocated in equal shares of R15000 per year each to the two children. Once one of the children has become self-supporting the total notional family income of R90000 per year[310] will be allocated 5 ways giving R36000 per year per parent and R18000 per year for the child. The mother's income is still R30000 per year. Her loss of support in that year is thus R36000 per year less her earnings of R30000 per year, that is to say R6000 per year. The child suffers a loss of R18000 per year. Once the second child leaves home the wife's yearly loss becomes the same as had there been no children in

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[307]In *Zimelka v Zimelka* 1990 4 SA 303 (W), on facts very similar to those used for the example in this paragraph, the father had custody of the children. A magistrate had ordered that the mother make monthly payments of support for the children to the father. This order was negated on appeal (the reported judgment), it being noted that the mother had *de facto* custody of the children for several months in the year and thus incurred substantial costs with their support. The judgment did not investigate whether the mother had a duty to provide the support that she did, nor was the appeal court asked to consider whether the mother was entitled to recover from the father what she had laid out for the support of the children. Considering the widely disparate standards of living there was much to be said for allowing the mother to recover these expenses from the father.

[308]See paragraph 13.8.4 for a more detailed explanation of the calculations.

[309]See paragraph 13.9.2.

[310]See numerical example 1 at 305 for a discussion of the effects of inflation and the approach thereto in these examples.

the first place.[311] The method of calculation described in this paragraph will hereafter be described as '**method A**'.

If it were the wife who had died then the net loss to the family would be her earnings of R30000 per year less the cost of her support of R30000 per year, that is to say a nil loss.

It deserves note that this method A allocates family resources to the children pro-rata the **surplus** income of each parent, as distinct from pro-rata the **total** income of each parent. By focusing on income surplus to each parent's personal requirements method A gives effect to the limited nature of the wife's right to support from her husband.

[13.9.10] Numerical example 4 (method B): Analysts who focus solely on the pro-rata aspect of the duty of support by a parent to a child prefer a different approach to that described in the previous paragraph. The husband's income of R60000 per year is apportioned with two parts to each parent and one part to each child, that is to say R20000 per year to the husband, R20000 per year to the wife, and R10000 per year to each child. By reason of the pro-rata obligation that the wife has to support the children her income is likewise apportioned with two parts to each parent and one part to each child, that is to say R10000 per year to the father, R10000 per year to herself, and R5000 per year to each child. A notable feature of this approach is that a working wife who earns sufficient to support herself is deemed to have a right to claim support from her husband, and simultaneously to be obliged to contribute to his support while he is working.[312] If the father is wrongfully killed then damages for loss of support by the children are calculated as R10000 per year per child until the oldest child leaves home. The father's income of R60000 per year is then apportioned 5 ways to give a child's share of R12000 per year until the youngest child becomes self-supporting. The widow's loss is calculated as R20000 per year less the R10000 per year that she was contributing to the deceased's support from her own income, that is to say a net loss of support for her at the rate of R10000 per year. After the oldest child leaves home the incomes are apportioned 5 ways and the widow's loss becomes R24000 per year (two parts of the deceased's income) less R12000 per year (two parts of the wife's income) giving a net loss of R12000 per year. Once the youngest child leaves home the widow's net loss becomes R30000 per year (one half of her husband's income) less R15000 per year (one half of her own income) giving a net loss of R15000 per year. The method of calculation described in this paragraph will hereafter be described as '**method B**'.

If it were the wife who had died then the husband would suffer no loss due to his high earnings but each child would suffer a loss of R5000 per year. Once the youngest child had

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[311] See numerical example 2 at 309.

[312] *Jodaiken v Jodaiken* 1978 1 SA 784 (W) 788H 'One of the legal consequences of marriage, whether in or out of community of property, is that the spouses owe each other a reciprocal duty of maintenance according to their means'. Taken literally this statement supports the seemingly anomalous cross-support provisions of method B. Having regard to the basic requirements for an enforceable duty of support (see 278 above) it is doubtful that this terse statement of principle means any more than that either husband or wife may have a duty of support, depending on circumstances, but not both at the same point in time. It is a contradiction of terms to suggest that a spouse should simultaneously have 'adequate means' and also be 'in need'.

left home the loss of the remaining child would increase to R6000 per year, being one fifth of R30000 per year.

[13.9.11] Method A is to be preferred: Method A has been preferred by a Cape court.[313] Method B has been preferred by a Transvaal court.[314] Other judgments point towards method A as the preferred approach:

* In *Yorkshire Insurance v Porobic*[315] the wife had been wrongfully killed. The damages were calculated by deducting from her income the cost of her support. The calculation was done over the period of dependency of the children. Had the wife's income been less than the cost of her support the damages would have been assessed as nil. With method B there is always a calculable loss for the children regardless of the cost of supporting the deceased.
* In *Milns* case[316] the court makes the point that a husband is only obliged to contribute to the support of his wife to the extent that her earnings fall short of what she requires for her support. Method B, on the other hand, takes the view that whatever a wife earns her husband is obliged to contribute two parts of his income to her support.

[13.9.12] Form of contributions by spouses: One argument raised in support of method B is that a mother will, for instance, buy all the groceries which are then applied for the benefit of all dependants. The father will pay the rent and the instalments for the family car. Each of these benefits is arguably shared pro-rata by all family members. However, if each parent has a right to recover excess payments from the other[317] then there would be a constant state of offset, an overpayment on groceries being offset against an overpayment on the rent, and so on. The fact that a wife buys all the groceries is then no more than the form of her contribution to the overall expenses of the household, just as when one engages in a joint venture, such as a safari trip to the Okavango, each member of the expedition contributes his or her share of the expenses. With a safari trip one does not say that one member one has bought all the groceries and thus contributed to the costs of each of the other members.

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[313] *Burns v NEG Insurance* 1988 3 SA 355 (C) 363-4. The preferred approach, method A, is described as 'the customary basis, as Mr Koch suggested'. Method B, 'that of Mr Beets', was rejected. The only reason given was that method B was 'prejudicial to the interests of the minor child'.

[314] *Bosch v Mutual & Federal Insurance* 1993 (T) (unreported 25.3.93 case no 2090/92). Central to the court's ruling was its finding that the ruling in *Zimelka v Zimelka* 1990 4 SA 303 (W) did not support the conclusions of Mr Koch in 1992 *THRHR* 128-34. The court, however, did not study any of the other judgments listed in the article in support of this conclusion. A series of relevant judgments on damages for loss of support were dismissed on the ground that they were irrelevant divorce matters (see paragraph 13.9.16). The court emphasised that the marriage had been in community of property. The court finds further support for its view in paragraph 46 of Mr Koch's report which it is interpreted to mean that method A does not put the claimants in the position they would have been in had there been no death. Mr Koch's report did not contain a paragraph 46 and the mysterious paragraph is not quoted in the text of the judgment. The court seems to have been unaware that method A required a larger award of damages to the children than did method B (see paragraph 13.9.14). It is notable that in this matter the actuaries did not give evidence before the court, as they did in the *Burns* matter (see footnote 313).

[315] 1957 1 C&B 90 (A); 1957 2 PH J16 (A).

[316] See quotation in paragraph 13.9.1.

[317] See paragraph 13.9.4.

[13.9.13] Equity between parents: When reliance is placed on a two-parts-one-part method of apportionment, as in numerical examples 3 and 4 above, the cost of support for the wife is *ex hypothesi* equal to that for the husband. This feature distinguishes the family situation from that where the parents live separately. When the parents live separately then each has a standard of living commensurate with his or her separate means. I have noted above[318] that even-handed justice between the parents requires that the parent with the higher standard of living is the one who should reduce his or her standard of living in order to provide for the children. The other parent should not be required to contribute until there is reasonable parity between the respective standards of living of both parents. Method A provides a calculation methodology for achieving this result.

Considerations of equity between the parents must, however, give way, when necessary, to the more important requirement that the children should be assured of proper support, whichever parent is required, in the short term, to reduce his or her standard of living in order to provide it. The question of the relative standards of living of the parents affects the right of one parent to claim a contribution from the other, but not the right of a child to claim support from whichever parent he or she chooses. Normally the children will live with the custodian parent who will personally meet most of the costs of the support of the children, and then claim a contribution from the other parent. The ongoing rate of contribution by the non-custodian parent would normally be formalised in terms of maintenance payments. The fact that the custodian parent buys all the groceries and pays all the rent does not mean that the children are entirely dependent on that one parent.[319] Regard must also be had to the contribution by the other parent.

[13.9.14] Spurious 'losses' indicated by method B: Revert now to the family situation where both husband and wife live together with the children and both have the same standard of living. In terms of both numerical examples 3 and 4 above each parent enjoys a standard of living based on R30000 per year. **In terms of method A** the wife's earnings are applied entirely to covering the cost of her own support and her husband meets the full cost of the support of the children at the rate of R15000 per year per child. **In terms of method B** the wife applies only R10000 per year of her earnings to her own support with R10000 per year applied to the support of her husband and R5000 per year to the support of each child. Her husband applies R20000 per year of his earnings to his own support, R20000 per year to the support of his wife, and R10000 per year to the support of each child. **If damages for the death of the father are determined using method B**, then the widow and children will be awarded compensation based on R10000 per year each. Prior to the death the children enjoyed support of R15000 per year each. For the balance of R5000 per year per child they are expected to continue to look to their mother. The mother will have R30000 per year by way of her own earnings. Her own cost of living is R30000 per year *ex hypothesi*. In order that she can provide each child with the additional R5000 per year, for which method B expects them to look to her, she needs a total of R40000 per year. The additional R10000 per year she gets by way of her own damages for loss of support. This R10000 per year that is accorded to the widow, ostensibly as damages for her own loss of support, is, in reality,

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[318]See paragraph 13.9.8.

[319]See paragraph 13.9.12.

the balance of the support needed to ensure that the children are able to maintain the same standard of living. Thus method B indirectly compensates the children for their father's death by awarding part of what they need to their mother. This seems to be a thoroughly unnecessary complication, particularly bearing in mind the very much larger deductions for general contingencies and remarriage, that are applied to compensation for a widow as compared to compensation for a child.

In the *Bosch* case,[320] where method B was preferred, the widow was about to remarry and her claim had been agreed to be nil. In such circumstances the additional R5000 per year needed for each child, to ensure continuing support at the same level as prior to the death, would have had to come from the children's stepfather.

In the circumstances of numerical examples 3 and 4 above method A leads to a larger award than does method B when it is the father who has been killed. The reasons have been set out in the previous paragraph. On the other hand, if it had been the wife who had been wrongfully killed method A would have indicated a nil loss for the children whereas method B would have indicated a 'loss' by the children based on R5000 per year per child. This 'loss', if such it can be called, is at odds with the overall financial position of the family. The family has lost the income of the mother of R30000 per year. The cost of her support was *ex hypothesi* R30000 per year. The net loss to the family is nil. If the children are then awarded compensation based on method B at the rate of R5000 per year each then the family will be better off, in a financial sense, after the death of the mother than before her death. The father will still have his income of R60000 per year. If the cost of his own support continues at R30000 per year then there will be R30000 per year, R15000 per child, available to support the two children. The father's income is thus entirely sufficient to support himself and the children after the death without the need for a contribution by way of damages from the defendant.

[13.9.15] Numerical example 5 (method A): Consider a family comprising a working father, a working mother, and two dependent children. Suppose the father earns R45000 per year, net after deductions, and the mother R30000 per year net after deductions. The total family income is thus R75000 per year.[321] The two-parts-one-part method allocates R25000 per year to each parent and R12500 per year to each child. The mother's income is R30000 per year. The cost of her support is *ex hypothesi* R25000 per year. Her surplus income, that is to say her 'means' available for the support of the children, is R5000 per year, that is say R2500 per year per child. The father's income is R45000 per year. The cost of his support is *ex hypothesi* R25000 per year leaving surplus income of R20000 per year. If this is allocated to the children in equal shares then each child is dependent on his or her father to the extent of R10000 per year. Once the oldest child leaves home the R75000 per year is apportioned 5 ways giving R30000 per year per parent and R15000 per year for the one remaining dependent child. The mother's income is R30000 per year. Thus while the family has only one dependent child she makes no contribution to the support of the child, but is also entirely self-supporting and thus not dependent on her husband. Once the youngest child

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[320]See footnote 314.

[321]These were the agreed facts before the court in the *Bosch* case (see footnote 314).

leaves home the income of R75000 per year is divided equally between husband and wife. The wife's dependency on her husband is then R7500 per year, that is to say R37500 per year less R30000 per year.

[13.9.16] Sources of legal authority: In *Lebona*'s case[322] it was said that to determine the incidence of the duty of support one should have regard to the position with a family divided. In *Bosch*'s case[323] it was said that divorce matters are not relevant to the assessment of damages for loss of support from a marriage. In general the writers on family law and the duty of support do not distinguish between damages cases and divorce matters when discussing the incidence of the duty of support.[324] The preferable view seems to be that regard may be had to divorce matters, provided it is borne in mind that after divorce the parents no longer share a common household and thus a common standard of living.

[13.9.17] Redistribution of burden of support: Suppose under numerical example 5 that the father had died under circumstances which did not give rise to an action for damages for loss of support.[325] The mother and the two children would then have had only her income of R30000 per year for their combined support. The two-parts-one-part formula indicates R15000 per year for the support of the mother and R7500 per year per child. Even when damages can be claimed it could be argued that the claims by the dependants for loss of support should be assessed having regard to this redistribution of the burden of support after the death. There seems to be general agreement, however, that the ruling in *Groenewald v Snyders*[326] precludes regard being had for such a redistribution of liability for the support of the children. The assessment of the damages proceeds on the basis that the dependants continue to live at the same standard of living, and with the same application of the contribution by the widow, as had the deceased remained alive. Whatever the family lacks is made good by the damages paid by the wrongdoer who thereby, in a manner of speaking, 'steps into the deceased's shoes'.

[13.9.18] Foreign jurisdictions: The assessment of damages for loss of support in England,[327] Canada[328] and Australia[329] generally has regard to the overall loss by the

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[322]*Lebona v President Versekeringsmpy* 1991 3 SA 395 (W) 402-3.

[323]See footnote 314.

[324]See, for instance, Hahlo 'Husband & wife' 5ed 134n46; Boberg 'Persons & Family' 255-6 308n28; Spiro 'Parent & child' 3ed 369n83.

[325]Assuming as well that there were no life polices nor pension benefits nor assets.

[326]1966 3 SA 237 (A) 248A-D; Milburn-Pyle & van der Linde 1974 *TASSA* 292 333-4; *Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A).

[327]McGregor 'Damages' 14ed 864 'The practice which is generally followed ... is first to assess the loss to the family as a whole and then to apportion the sum between the various dependants. ... Nevertheless the court is entitled to consider the case of each dependant separately in the first instance, thus ascertaining the total sum by addition'.

[328]Cooper-Stephenson & Saunders 'Damages in Canada' 417 'One mode of assessing damages in a fatal accident claim is to calculate first the loss to the family as a whole and then to divide that sum among the various dependants. The preferable mode, however, is to make a separate calculation for each dependant right from the start. ... At the very least, if judges insist on attempting to compute the family loss first, they should be careful to postpone any necessary deductions until after the loss has been apportioned. Deductions on account of matters such as contingencies, collateral benefits and, in some instances, contributory negligence, should not be made against the

family, that is to say the contribution made by the deceased breadwinner, usually by way of earnings, is reduced for the saved living expenses of the deceased.[330] The loss indicated by this calculation is then apportioned to give the damages to be separately awarded to each dependant in his or her own right. The major objection to this approach is that it fails to have regard to the different contingencies and collateral benefits affecting different claimants. For this reason the overall damages is sometimes assessed, as in South Africa, by first having regard to the damages for each individual dependant.

[13.9.19] Chances of death, divorce or unemployment: The nil loss for the death of the mother calculated under numerical example 3 above is based on the assumption that both parents remain alive, married to one another, and that both retain their employment. There are substantial contingencies attaching to all these considerations which justify a small award to the children for the value of the chance that things may not have turned out as expected, and that the children may have found it necessary in the future to depend entirely on the earnings of their mother.[331] The damages for this consideration would ideally be assessed by taking a percentage of 5% or 10%, say, of the damages that would have been awarded had the deceased mother been the only parent, that is to say ignoring the existence of the father.

[13.9.20] Further children: The discussion thus far has ignored the effect of further children. Suppose that a third child was born to the family discussed under numerical example 3 above. The cost of the support for father and mother would then have reduced to R25714 per year. The mother's earnings of R30000 per year would then have exceeded the cost of her own support by R4286 per year. To this extent she would be contributing to the support of the children. Her contribution of R4286 per year is appropriately apportioned in equal shares between the three children giving R1429 per year per child. If she were to be killed then all three children would, in terms of method A, have claims for loss of support. When a parent has been killed it is sometimes appropriate, having regard to the circumstances of the family, to make explicit allowance in the calculation for further notional children.[332] In terms of numerical example 3 above the children suffer no loss on the death of their mother. However, if a third child were to be hypothesised then method A would indicate a loss of support for the two claimant children, that is to say increases the damages. Usually, however, the allowance for further children decreases the damages.

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family as a whole but only against that dependant to whom the particular deduction relates'.

[329]Luntz 'Damages' 2ed 'If the total damages are arrived at by assessing the loss of each claimant separately and then adding up the amounts, the necessary apportionment is achieved automatically. Where, however, the loss to the family as a whole is calculated, the method of apportionment needs some consideration. ... However, provided that in the actual apportioning process, the gross loss is first divided and then the gains of individual claimants are set off, it would generally not matter that at an earlier stage the total damages had been arrived at by setting off the total gains against the gross loss'.

[330]This is much the same procedure as is contemplated by method A (see paragraph 13.9.14).

[331]Considered in *Cooke & Cooke v Maxwell* 1942 SR 133 136 but for technical reasons not awarded.

[332]See footnote 236.

[13.9.21] Services in the home: The deceased may have rendered valuable services in the home for which a claim may be brought. Traditionally this claim lies with the husband[333] but, as I have noted above,[334] there is much to be said for allowing a claim to the children for a proportion of the value of the services rendered by their mother.[335] This latter approach would cover instances where the father's own claim has prescribed. When the father claims in his own right he must offset what he has saved by reason of no longer supporting his wife. For a working wife this deduction may be very small if not nil.[336] However, working wives will often employ domestic help and this factor needs to be brought into account. It follows that evidence will need to be submitted as to the extent and value of the services which she provided.

[13.9.22] Wife's personal obligations: A working wife may have a duty to support her illegitimate child or her aged mother. Her husband, on the other hand, has no duty to support his wife's mother,[337] and in the absence of community of property no duty to support the child.[338] How then is the wife's dependency to be calculated for loss of support arising from the death of the husband? The approach adopted in *Lebona*'s case[339] was to apply the widow's income first to the support of her personal dependants with only the balance of her income being applied to her own support. To the extent that this balance fell short of her two-part share her husband was then deemed to provide her with support. Otherwise stated the compensation awarded to the widow was the difference between her own earnings and what she needed in total for herself and those dependent on her who do not have claims for loss of support *eo nomine*. This is an application of the general principle that the claim of a father (or mother) should have regard not merely to the personal needs of the claimant but also to what additional amount the claimant needs to support his or her dependants.[340]

[13.10] WIDOW'S EARNING CAPACITY HAVING REGARD TO THE DEATH

[13.10.1] Widow's earnings are ignored: A non-working wife is not required to mitigate her damages after the death of her husband by going out to find employment.[341] Even if she has taken up employment this income must be ignored when assessing her loss.[342] If she had been working prior to the death, or would have gone out to work even if her husband

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[333] *Union Government v Warneke* 1911 AD 657 669; *Erdmann v Santam Insurance* 1985 3 SA 402 (C).

[334] See paragraph 13.6.2.

[335] McGregor 'Damages' 14ed 896-7.

[336] See numerical example 3.

[337] *Ford v Allen* 1925 TPD 5.

[338] *S v MacDonald* 1963 2 SA 431 (C) 433C; Spiro 'Parent & Child' 3ed 368n74; s17(5) of Matrimonial Property Act 88 of 1984.

[339] *Lebona v President Versekeringsmpy* 1991 3 SA 395 (W) 399-400.

[340] *Oosthuizen v Stanley* 1938 AD 322 331.

[341] *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376B. Cooper-Stephenson & Saunders 'Damages in Canada' 438 446; Luntz 'Damages' 2ed 447-8 records this same principle.

[342] *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376.

had lived, then her earnings subsequent to the death are relevant, but only as guide to what she would have earned but for the death.[343] The logic of these rules has become plainer with the ruling in *Evins v Shield Insurance*[344] that the action for loss of support and the action for loss of earning capacity are separate and distinct actions. The value of lost support is calculated as though the wife/widow's earnings had continued uninterrupted through the event of her husband's death. Any loss that she experiences by way of earnings must be recovered by way of a separate action for personal injury.[345]

When considering this conclusion the reader should bear in mind that under 'method A' the two-parts share of family income that she would have enjoyed had her husband lived is determined by reference to the joint income of her and the deceased. If her reduced earnings after the death are used for the calculation this understates her two-parts share. For example consider a deceased breadwinner who earned R90000 per year and a wife who earned R30000 per year. The total family income was thus R120000 per year. Assume that the wife, now a widow, takes up a half-day job after the death and earns only R18000 per year. Assume that there are two children. The wife's two-parts share of the total family income **while her husband lived** was thus R40000 per year.[346] Her loss of support is the difference between R40000 per year and her earnings of R30000 per year, that is to say R10000 per year. By reason of her changed employment she suffers a further loss of R12000 per year being the difference between R30000 per year and her actual earnings after the death of R18000 per year. This, however, is not a loss of support but a loss of earnings. The extent to which she may claim for this loss of earnings will depend on the cause of that loss.

[13.10.2] Widow's changed tax position: If a wife continues working after the death of her husband, with the same earnings as prior to the death, her liability for taxation will reduce: Prior to the death she would have been taxed according to the table for married women; after the death she will be taxed according to the table for single breadwinners.[347] The calculation of damages for loss of support proceeds as though the death had not occurred.[348] For this reason her gain from lesser taxation should be ignored when assessing her damages for loss of support. Her gain from reduced taxation would, however, be relevant to any claim she submits for loss of earnings arising from her personal injury.

[13.10.3] Widows who cease working: It does happen that, due to the shock of the event and/or the needs of the children for closer care, a widow ceases employment after the death

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[343] *Milns v Protea Assurance* 1978 3 SA 1006 (C) 1012-13.

[344] 1980 2 SA 814 (A).

[345] The two separate actions may be brought jointly if the necessary formalities have been met.

[346] One third of R120000 per year (R90000+R30000).

[347] This holds true for the tax tables applicable in South Africa for the 1992/93 tax year.

[348] See paragraph 13.9.17.

of her husband.[349] For certain cultural groups cessation of employment after the death of a spouse is mandatory.[350] The loss of earnings suffered by the widow under these circumstances is patrimonial and to be distinguished from the agony of pure emotional shock.[351] As a general rule compensation will not be awarded for loss of earnings occasioned by the death of a husband.[352]

One exception to this principle would be where the loss has been occasioned by the need to care for the children.[353] The question of loss of services in the home has been discussed above.[354] The earnings foregone by the widow must needs be reasonable having regard to the services that have been lost. In other words a wife who worked full day would, in the absence of the death, have, in any event, had to make arrangements for child care. The need to cease work may be occasioned by a perceived need to attend to the shocked state of the children over the death. South African law is a little bit vague as to whether such a claim lies under the dependants' action or under the action for personal injury. Suffice it say that the need for a widow to stay at home with her shocked children can at best be of fairly short duration.

[13.10.4] Child's loss of earning capacity: The death of a father may well interfere with a child's career. This might happen, for example, if the family business collapses before the child is old enough to take it over; or there may be a lack of funds during the pre-trial period with a consequent delay with the child's qualification in a professional capacity and subsequent entry into the labour market. A delay of this nature will give rise to a loss of earnings.[355] The ruling in *Evins v Shield Insurance*[356] suggests that compensation for such losses must be claimed under the action for personal injury. This action is not available if the loss is caused by the death of another without psychological or physical injury to the child. It seems that as a rule the loss must go uncompensated.[357]

[13.11] EMPLOYMENT IN THE FAMILY BUSINESS

[13.11.1] The duty of support: Where the wife works for her husband in the family business she thereby saves him the cost of employing an outsider to do the work. Sometimes the wife will receive salary payments from the business. More often she will receive no explicit

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[349]Life insurance and pension benefits payable as a result of the death are ignored in terms of the Assessment of Damages Act 9 of 1969. For this reason a widow may cease to need to work and yet still have a claim for damages for loss of support. Her loss of earnings is, however, a loss of her own making.

[350]Notably Moslems.

[351]See footnote 3.

[352]English and Australian law do not compensate under the dependants' action a purely commercial loss such as loss of a contract of employment or partnership (Luntz 'Damages' 2ed 409-10).

[353]For instance, the husband may have worked day shifts and the wife night shifts.

[354]See section 13.6.

[355]See, for instance, *Du Preez v AA Mutual Insurance* 1980 3 C&B 206 (E) 223-4; *Protea Assurance v Lamb* 1971 2 C&B 117 (A) 125-6 (relevant text omitted by editors in 1971 1 SA 530 (A)).

[356]1980 2 SA 814 (A).

[357]*Bester v Commercial Union Versekeringsmpy* 1973 1 SA 769 (A). See too footnote 352.

salary payments but will be provided with money with which to meet family expenses, possibly through a bank account operated jointly with her husband. In order to test the incidence of the duty of support one must consider a breakup of the family by say, divorce. She would probably find herself without employment but her husband would find himself without her services in the business. The skills applied in the family business may enable her to obtain alternative employment. If so then she is in the same position as regards claiming support from her husband as though she had such employment all along. If she cannot find employment then she will have a right to claim support from a husband whose income has in the meanwhile been reduced by the cost of employing a substitute. In the light of these considerations what then is the loss she suffers in the event of her husband's death?

[13.11.2] Earnings after the death are ignored: If she has taken over the family business and is successfully running it for her own account, this fact must be ignored.[358] The underlying principle would seem to be that a gain or loss of earnings should be dealt with strictly under the action for personal injury and not the action for loss of support.[359] This same reasoning suggests that if the family business has ceased with the husband's death and she becomes unemployed and suffers a loss of earnings then this fact cannot be taken into account when assessing her loss of support. The value of her earning capacity for purposes of loss of support must be determined as though the death had not occurred.

[13.11.3] What model now?: The cost of replacing her services in the family business would be the measure of her earning capacity, and she is to that extent notionally capable of supporting herself. This capacity reduces the value of her right to claim support from her husband. In *Mariamah*'s case[360] the court made allowance for the wife's one-third contribution to earnings derived from the family business by deducting one third from the value of her claim. Both models A and B require a deduction of two thirds.[361] This point is mentioned in the heads of argument for the appeal but is not discussed in the appeal court's judgment. The *Mariamah* case provides no real assistance on the basic principles in this regard[362] save perhaps to emphasise that there is no general principle which the courts consistently apply.

[13.11.4] Savings in expenditure: The distinction between a wife's services in the home and her services in the family business can be a fine one. It has been said that the capacity to render services in the home, ie home-making capacity, is of the same nature as earning capacity.[363] The wife's work capacity applied to home-making does not affect her right

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[358]*Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 727-8.

[359]*Evins v Shield Insurance* 1980 2 SA 814 (A).

[360]*Mariamah v Marine & Trade Insurance* 1977 2 PH J30 (D); *Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A).

[361]One third of the total income from the business is two thirds of the wife's half-share thereof. For example R4000 py out of R12000 py of total income is two thirds of R6000 py, the half share.

[362]*Nochomowitz v Santam Insurance* 1972 1 SA 718 (T); this judgment, like the *Mariamah* ruling, is inconclusive. In *Williams v British America Assurance* 1962 2 PH J18 (SR) the damages were assessed without regard for the husband's earnings nor the saved cost of supporting him!

[363]*Erdmann v Santam Insurance* 1985 3 SA 402 (C) 406-7 read together with 409E.

to claim support from her husband whereas the wife's work capacity exercised in the family business does affect her right to claim for loss of support.[364] Yet in both circumstances the wife's services give rise to a saving in expenditure. The activities of the wife in the family business increase the cash income of the family by a saving in business expenditure. The activities of the wife in the home improve the quality of family life and increase the family's spending power by a saving in domestic expenditure.

[13.11.5] Taxation: If a wife ceased to assist in the family business her husband would need to hire a substitute.[365] The overall income of the family would be reduced by this cost. This expense would be tax deductible and should be adjusted for the tax saving. The value of the notional contribution by the wife is thus not the full cost but that cost less tax at the husband's marginal rate. The tax tables for married women are such that it may pay the family to have the wife go out to work and to hire an outsider to perform services in the family business. If, despite the tax advantage, a wife does not go out to work away from home, this would suggest that her contribution to the family business is worth as much or more than her potential net income away from home. For this reason it would usually be reasonable to assess the tax adjustment to the value of the wife's services as though she had worked outside the family business.

[13.11.6] Assessment of damages: In *Porobic*'s case[366] the deceased wife had been running a store on her husband's farm. The loss was assessed by deducting from the income she generated the estimated costs of her support. In *Mariamah*'s case[367] allowance for the wife's services was made by reducing her compensation by one third, this being her agreed contribution to the profits of the business. The children's claims were not correspondingly reduced, as one would have expected had the method of calculation been consistently carried through. The *Porobic* and *Mariamah* judgments cannot be reconciled. In practice it seems likely that damages will be assessed as though the wife had earned as income the deemed value of her services in the family business.

[13.12] REMARRIAGE

[13.12.1] Financial value: If a widow remarries, her right to support is reinstated. On the death of her husband the value of her loss of support is reduced for the contingency of such remarriage.[368] The deduction to be made will depend not only on the percentage chance

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[364]*Mariamah v Marine & Trade Insurance* 1977 2 PH J30 (D); *Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A).

[365]See, for instance, *Plotkin v Western Assurance* 1955 2 SA 385 (W). This matter was concerned solely with past loss. *Erdmann v Santam Insurance* 1985 3 SA 402 (C) sets out the principles governing a future loss in the event of injury to the wife.

[366]*Yorkshire Insurance v Porobic* 1957 1 C&B 90 (A).

[367]See footnote 418.

[368]*Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376D; *Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A). More generally see Davel 'Skadevergoeding' 124-8.

of remarriage but also the likely income, age and other characteristics of the second husband.[369] A second marriage may mean further children.

A deduction for remarriage should also be applied to the value of a lost *spes* of inheritance if the evidence suggests that the notional new husband will have assets and will bequeath some or all of these to his new wife.

The deductions made in practice range from 0% to 70%.[370] This corresponds with the range of deductions indicated by remarriage statistics.[371]

[13.12.2] The remarried widow: If the widow has actually remarried prior to the final assessment of compensation the financial circumstances of her new husband will cease to be a matter for speculation. The new husband may provide not only an income but also prospects of inheritance and services in the home. If the value of support expected from this husband is greater than the value of support expected from the deceased then the claim for future loss of support will fall away. In other words the deduction for remarriage is concerned not only with the right to support itself but also with the value of that right to support. If the value of prospective benefits from the new marriage exceed the value for old marriage then the widow has gained. There is no reason why this gain should not be offset against her past loss of support up to the date of remarriage.

In *Glass*'s case[372] it was ruled that if remarriage has taken place then no regard may be had for the lesser value of the right to support from the second husband. The *Glass* case is couched in disturbingly emotive terms and seems to have misinterpreted the earlier judgments. It seems unlikely that the *Glass* ruling will be followed by future courts.

[13.12.3] Period until remarriage: **The deduction for remarriage reflects the value of the chance of remarriage.** This deduction reduces the 'multiplier' used in a gross multiplier calculation[373] and for this reason one finds reference in the literature to a 'period of widowhood', that is to say the number of years until remarriage.[374] This simplistic interpretation of the multiplier is misleading and should, if at all possible, be avoided. Consider the following example: The tabular remarriage rate at age 50 for a white woman

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[369]*Legal Insurance v Botes* 1963 1 SA 608 (A) 617-18; *Roberts v London Assurance (3)* 1948 2 SA 841 (W) 850. In practice one often finds the widow's calculation of loss of support cut off from the date of remarriage on the grounds that her right to support from a different breadwinner has been reinstated. The *Botes* and *Roberts* judgments state by implication that reinstatement of the right to support does not terminate the claim calculation at that point in time and that regard should be had to the financial value of the new right to support.

[370]Davel 'Skadevergoeding' 125n914.

[371]See *Quantum Yearbook* 1993 at 84 (0% to 75%).

[372]*Glass v Santam Insurance* 1992 1 SA 901 (W).

[373]The net multipliers used by the English courts are reduced for all general contingencies (see 97).

[374]Boberg 1966 *SALJ* 402 407-9 'Remarriage is relevant because it reduces the period of dependency'; Boberg 1988 *BML* 55 56 'The whole object of reducing damages for remarriage prospects is to ensure that, theoretically, nothing remains of the award by the time the widow remarries' *Legal Insurance v Botes* 1963 1 SA 608 (A) 617inf.

is 10%.[375] Her expectation of life is 27,8 years.[376] The 'period until remarriage' calculated according to the remarriage percentage deduction is then 25 years, that is to say until she is about age 75. This is clearly an untenable proposition. She will either to remarry fairly soon after the death or remain single.[377] Compensation by instalments provides no solution because widows will then just refrain from remarriage.[378]

[13.12.4] Increased remarriage rates: Once endowed with a lump sum the widow's chances of remarriage may be enhanced well above average.[379] Many widows will have forestalled remarriage plans pending the finalization of the claim for loss of support. Deferred marriage plans are likely to have the effect that remarriage rates amongst compensated widows are well above the statistical average. For this reason when assessing damages for loss of support the deduction for remarriage should really exceed the population average revealed by statistical tables.[380]

[13.12.5] Death occasions remarriage: The deduction for remarriage reflects the present utility of the prospect of a second husband. As has been noted in the discussion of causation above, the death of the first husband does not cause this remarriage but occasions it in the sense of increasing the likelihood of such an event in the mind of the reasonable man.[381]

[13.12.6] Divorce rates: Population statistics indicate that about 20% of white marriages concluded in 1960 had been dissolved by 1980, a divorce rate of roughly 1% per year.[382] The divorce rate increases markedly for marriages concluded more recently.[383] The risk of divorce is greatest during the first 5 years of marriage.[384] The conclusion to be drawn from these statistics is that the risk of divorce for a white marriage is substantial and of the order of 1% for each year until about age 55. That is to say about 20% for a couple with an average age of 35. The deduction for the contingency of divorce would be roughly half

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[375]Thomson 1988 *De Rebus* 67 70.

[376]Koch 1986 *De Rebus* 551 552.

[377]With a fairly remote possibility of a marriage late in life.

[378]*De Wet v Odendaal* 1936 CPD 103 107 'She may also be deterred from a further marriage by the consideration that she will lose the usufruct'; for comparative remarriage rates see Koch 1988 *De Rebus* 631 632. Davel 'Skadevergoeding' 128n957 displays little sympathy for widows who deliberately defer remarriage for financial gain.

[379]*Roberts v London Assurance (3)* 1948 2 SA 841 (W) 850; *Trimmel v Williams 1952 3 SA 786 (C) 793C-D; Burns v NEG Insurance* 1988 3 SA 355 (C) 364H.

[380]Such as Thomson 1988 *De Rebus* 67 70. These statistics include remarriages by widows who have waited for damages awards. The extent to which the statistical remarriage rates are distorted by the inclusion of late marriages by compensated widows is not clear, but one suspects that the error is of negligible proportions in so far as damages assessments are concerned.

[381]Boberg 1964 *SALJ* 194 204n52. See section 11.9.

[382]Strijdom in HSRC 'Marriage & Family Life' 446 462. For the 1960 cohort the proportion divorced rises quite evenly from 4,7% in the first 5 years to 10,3% after 10 years, 15,3% after 15 years and 19,2% after 20 years.

[383]Strijdom in HSRC 'Marriage & Family Life' 446 462 records 8,8% divorces in the first 5 years for 1975 marriages compared to 4,7% for 1960 marriages.

[384]Strijdom in HSRC 'Marriage & Family Life' 446 464 records that 39,5% of white divorces in 1984 had a duration of less than 5 years. 11% of divorces were for marriages which had endured more than 20 years.

of 20%, that is say 10%, because even if divorce within 20 years were a certainty the time of that divorce remains unknown. A doomed marriage may yet last a further 10 years. A further adjustment would probably be made for the prospect of maintenance and remarriage.

One thing that is clear from these high divorce rates is that a white married woman has a substantial chance, while married, that in her lifetime she will become divorced from one husband and remarried to another.[385] If her present husband dies this chance of remarriage then increases substantially.[386]

[13.12.7] Remarriage by blacks: The remarriage rates for coloureds and asians are very much lower than those for whites.[387] Little is known of the remarriage rates for blacks. The *ukungena* custom[388] amongst tradition-minded blacks reflects a taboo on remarriage. The wife is considered property in the deceased's estate paid for with the bride price, the *lobola*.[389] A designated male, usually a brother of the deceased, acquires the duty to consort with the wives of the deceased. The primary purpose of this custom is to ensure further children for the deceased's house, 'the cattle not the man beget the children'.[390] The custom belongs to a culture where children provide labour and are considered a financial advantage. The custom brings with it a duty to provide support for the children.[391] It seems reasonable to anticipate that with education and urbanization the customary taboos and values will lose strength and remarriage will become more common, possibly moving towards the rates observed for the coloured population.[392]

[13.12.8] Remarriage statistics: The appellate division has seriously undermined the usefulness of remarriage statistics as a basis for dispute resolution.[393] It seems likely that this was unintentional, the emphasis being on the diverse factors which should be allowed to supplement the statistics. That remarriage is a fickle subjective issue is beyond doubt. This, it seems, is all the more reason for preferring an objectively determined statistic to the

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[385]Strijdom in HSRC 'Marriage & Family Life' 446 450-3 records copious statistics concerning the status of persons contracting marriages. In 1984 32,3% of white marriages included at least one partner who had been previously divorced. In 13,3% of marriages both parties had been previously divorced.

[386]One is here reminded of the 'adequate cause' theory proposed by von Kries (Hart & Honoré 'Causation' 2ed 469) that there is causation if the wrongful act has increased the chance of the event by a substantial amount. Causation of remarriage by death clearly falls within this definition. See too 207 above.

[387]Thomson 1988 *De Rebus* 67 70.

[388]Seymour 'Customary law' 5ed 286-94; Van der Vyver 1964 *THRHR* 94-115.

[389]Hahlo & Kahn 'SA Legal System' 344 'Matrimony (under the old Germanic law) had the features of the African *lobola*-marriage'.

[390]Seymour 'Bantu Law' 3ed 266.

[391]Seymour 'Bantu Law' 228-9.

[392]For practical purposes one would probably have to give equal weight to the customary law and the social realities reflected in the statistics. This would mean using a remarriage deduction of one half of the coloured rate (see Thomson 1988 *De Rebus* 67 70).

[393]*Legal Insurance v Botes* 1963 1 SA 608 (A) 617inf 'The census statistics ... should not be regarded as a starting point, but merely as one of the facts, to be considered along with all the other facts - one of which is that Cupid is notoriously incorrigible and unpredictable'.

'gut feel' of the court.[394] Reliance on statistics would place the remarriage issue on the same footing as the allowance for mortality and substantially obviate the need for judges to engage in what many perceive to be distasteful speculation.[395] Depending on the evidence the tabular remarriage rate may then be adjusted for relevant considerations.[396] One must in any event express serious reservations about the subjective judicial assessment of remarriage prospects for widows from unfamiliar cultural backgrounds. White remarriage rates are very high compared to other social groups in South Africa and a white judge should be wary of overstating the remarriage prospects of a black widow.[397]

It is common that the widow is injured in the same accident that killed her husband. Such widows will usually have reduced chances for remarriage. The loss of marriage prospects is caused by her injury and not by the death of her husband. It follows that her claim for loss of support should be assessed as though she had not been injured and had normal remarriage prospects. She then has a separate claim by way of her personal injury for loss of the financial benefits of marriage.[398]

[13.12.9] Effect of children: Due to the effect of a dowry and forestalled marriage plans the tabular rates are probably too low for widows claiming compensation.[399] The opinion of a white widow on her remarriage prospects has been given little weight[400] whereas the opinion of a black widow has been accepted.[401] The presence or absence of children may require an adjustment to the tabular rate.[402] It needs to be borne in mind, however, that the children will be largely self-supporting due to the award to them of damages.[403] The tabular remarriage rates relate to average widows who would have an average number of children, and a downward adjustment is suggested for widows with more than the usual quota of children. Conversely for the widow without children the tabular rate should be increased.

[13.12.10] Case study: Consider the following circumstances: After the death of the breadwinner, a freshly qualified surgeon, the widow, previously a housewife, trains as a

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[394]*Southern Insurance v Bailey* 1984 1 SA 98 (A) 114D.

[395]Boberg 1976 BML 113 114. Much of the problems experienced by the courts in this regard would be avoided if the average was taken as a starting point to be modified in the light of the evidence before the court.

[396]Such as cultural and physical factors and the likely level of support from remarriage.

[397]The approach of the court in *Masiba v Constantia Insurance* 1982 4 SA 333 (C) 344-5 was to accept the widow's evidence and make no deduction at all. The defendant did not lead evidence on the point. More generally see Burman 'African customary law' 74-81.

[398]See paragraph 12.4.3 and section 13.10.

[399]See paragraph 13.12.4.

[400]*Legal Insurance v Botes* 1963 1 SA 608 (A) 617F 'Her attitude is that she will not remarry unless it is necessary to do so to support her child. I think little weight should be attached to her attitude'.

[401]*Masiba v Constantia Insurance* 1982 4 SA 333 (C) 344-5 'having regard to her evidence that she did not wish to remarry in the future, which I see no reason to reject...'.

[402]Boberg 1964 *SALJ* 194 218n43 'I devote no time to consideration of the likelihood of a widow with seven children remarrying'; Davel 'Skadevergoeding' 125n20.

[403]*Trimmel v Williams* 1952 3 SA 786 (C) 793C-D.

teacher and then marries a teacher and herself continues working. How now is the adjustment for remarriage to be assessed?[404] The new husband earns much less than the deceased. The value of her right to support from her new husband is close to nil because she is largely self-supporting. However, no regard may be had for her earnings.[405] In fairness to the defendant it seems that her earnings should be left out of account when determining the value of her right to support from the second husband.

[13.12.11] Remarriage by a widower: It does happen that a deceased wife was the main breadwinner. One then needs to consider the allowance to be made for the remarriage prospects of the widower.[406] There are no statistics for remarriage rates for men. These rates will be higher than for women if it be true that there is a tendency that a man on second marriage to chooses a wife very much younger than the first.[407]

The claim by a father for the loss of the services of his deceased wife has been reduced for the contingency that he may remarry and thereby replace the services.[408] If the value of the mother's services has been included in the claims for each child[409] then no deduction would be made for the contingency of the father's remarriage.[410] The father's claim would then include only the value of his share of the deceased's services. Such a claim is properly reduced for the contingency of his remarriage and for what he would otherwise have expended on supporting his late wife.

[13.12.12] Adoption of a child: The adoption of a child will be ignored. The adoption of an orphaned child has been likened to the remarriage of a widow.[411]

[13.12.13] Criticism of the remarriage deduction: The deduction for remarriage has been the subject of substantial criticism.[412] Much of this criticism reflects a failure to appreciate the nature of causation in the sense of occasioning an event.[413] The remarriage deduction is entirely reasonable if lump-sum compensation is seen for what it is, a fair price for which to forego the right to bring further litigation against the defendant.

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[404]These are the facts of a claim which was eventually settled on the basis that the period for the claim terminated when the new marriage re-established the right to support. No regard was had for the value of the new right to support.

[405]*Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A).

[406]If the husband was in ill health, or otherwise disabled from working, then his remarriage prospects may be negligible.

[407]I have been unable to find researched authority for this proposition which seems to be true in terms of general experience.

[408]*Cooke & Cooke v Maxwell* 1942 SR 133; Boberg 1964 *SALJ* 194 216n28.

[409]See section 13.6.

[410]*Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D.

[411]*Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A).

[412]*Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A); 123F; Davel 'Skadevergoeding' 127-8.

[413]See paragraph 2.8.2 and section 11.9.

[13.13] LOSS OF INHERITANCE PROSPECTS

Before discussing the deduction for accelerated benefits it is useful to consider more generally the extent to which damages will be awarded for loss of inheritance prospects. The main concern here is with loss of inheritance prospects occasioned by early death, but other causes of loss of inheritance prospects will be canvassed.

[13.13.1] Interference with testator's free will: Damages will not be awarded for loss of inheritance prospects if a testator has been persuaded to change his will by reason of wrongful conduct.[414] If there has been fraud or duress the new will may be declared invalid.[415] The legal mechanism for righting the balance is by way of forfeiture and not damages.

[13.13.2] Negligence as to procedures: In *Trumpelmann v Barclays Bank*[416] there was a substantial out-of-court settlement for loss of inheritance. The bank, which held itself out to be an expert in such matters had been negligent in the preparation of a will. There was no interference with the exercise by the testator of his freedom of testation. The wrongful act was negligently to fail to follow the procedures legally required to give effect to that intention. It seems highly likely that a South African court apprised with such circumstances would award damages.[417]

[13.13.3] Caused by early death: Damages for loss of inheritance prospects will be awarded under the dependants' action in conjunction with a claim for loss of support.[418] The most common form of such an award is by way of the deduction for accelerated benefits when a value is placed upon the *spes* of inheritance had the death not occurred when it did.[419] Where the deceased would have received a substantial retirement lump sum had he lived so long then his estate would have been swelled after retirement with an associated increase to the value of the inheritance prospects for his heirs.[420] This circumstance can give rise to a calculable loss of inheritance prospects without there having been any material inheritance at the time of the early death.

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[414] *Millward v Glaser* 1949 4 SA 931 (A) 941; *Hayward v Protea Insurance* 1985 3 C&B 588 (C) 598-601.

[415] Corbett Hahlo Hofmeyr & Kahn 'Law of Succession' 77.

[416] *Trumpelmann v Barclay's Bank* reported in *Sunday Times* 04.10.81 pg 7. At the instance of the bank the will had been initialled on each page instead of being signed in full.

[417] In *Ross v Caunters* [1979] 3 All ER 580 (ChD) damages were awarded to a disappointed legatee because the attorneys had failed to warn the testator as to the proper procedures. See further Cilliers 1980 *De Rebus* 388; Erasmus 1980 *De Rebus* 389; Wunsh 1988 *TSAR* 1; Sonnekus 1981 *TSAR* 172.

[418] *Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A) 481 488-9. In this case the family had lived on drawings from the family business. The drawings were somewhat less than the net profit generated by the business. The unconsumed profits were saved by way of ploughback into the business. The court ruled that the damages calculation should be based on the profits and not the drawings.

[419] See paragraph 13.14.1.

[420] See paragraph 5.5.3.

The award to a dependant, usually the widow, of the value of lost inheritance prospects is an example of the award of the value of the chance.[421] A proper adjustment needs to be made for general contingencies. It needs to be borne in mind, however, that the dependency calculation based on the deceased's earnings includes that part of the earnings which would have been accumulated as further savings.[422] Because the dependants' action is directed at compensating loss of support it is proper to restrict the award for loss of inheritance prospects to such amounts as would be reasonable for providing ongoing support. As a rule the award for loss of inheritance prospects is made in conjunction with a deduction for what has been inherited. *Mariamah*'s case[423] provides an example of an award for loss of inheritance prospects separately from a deduction for accelerated benefits. This suggests that, **in conjunction with a claim for loss of support, a claim for pure loss of inheritance prospects would receive favourable consideration by the courts.**

Consider the following example: The will of the deceased's father provided that the family farm go to his son, now deceased. The deceased's father dies one year after his son leaving the farm to the deceased's brother. Had the son not died he would have inherited the farm from his father, and the deceased son's wife, now a widow, would have had substantial prospects of inheritance. This seems to be an instance where an award for the value of the chance of lost inheritance prospects could and should be made.[424]

[13.13.4] Ongoing support from inheritance: The dependants' action is directed at compensation for what has been lost by way of support.[425] The dependants are compensated for loss of inheritance prospects because an inheritance would have provided for the continuation of support.[426] Consistent with this principle a self-supporting child has no right of action for loss of inheritance prospects in the event of the premature death of his father.[427] It follows that any award for loss of inheritance prospects should be limited to what is needed to provide ongoing support. This is particularly relevant when assessing compensation for a dependent child because the chance, the *spes*, of inheritance during the period of dependency will usually be so small that it may be ignored.[428] It also is relevant in this regard that a child is not required to apply inherited capital to meeting the costs of

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[421]See chapter 4.

[422]See footnote 418.

[423]See footnote 418.

[424]A surviving wife would usually be left the usufruct of the family farm. In the event of marriage in community of property she will often become a half-owner of the farm immediately her husband acquires it.

[425]*Legal Insurance v Botes* 1963 1 SA 608 (A) 614E; *Peri-Urban Areas Health Board v Munarin* 1965 3 SA 367 (A) 376B; *Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D.

[426]*Millward v Glaser* 1949 4 SA 931 (A) 940. Reinecke 1976 *TSAR* 26 50-56 states that there is no good reason for protecting inheritance prospects *per se* (at 55).

[427]*Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 304D-E.

[428]Davel 'Skadevergoeding' 132n2 maintains that a child should be compensated for inheritance prospects falling outside the period of dependency. Reinecke 1976 *TSAR* 26 55 writes as regards this anomaly 'Hoekom sou 'n kind wat 'n afhanklike is, maar skadeloos gestel is, se aanspraak sterker wees as 'n kind wat nie 'n afhanklike is nie?'

support.[429] It follows that only the income from the inheritance may be brought into account as a deduction.[430] Where the child has inherited cash the interest earned on that money will be deducted. Where the child has inherited real assets, such as a share in the family home, it is by no means clear to what extent the value may be brought into account. In practice one usually assumes that the real asset has been converted to cash shortly after the death.

[13.13.5] Incongruous ruling: In *Burns v NEG Insurance*[431] the deceased's employer had improved the pension fund benefits between date of death and date of trial such that had the employee died at a later date his widow would have received a substantial pension. Because the death was premature the widow did not receive a pension. Compensation was claimed for the value of the loss of this *spes*.[432] The interpretation of the Assessment of Damages Act[433] is not governed by considerations of fairness.[434] Compensation was denied on the grounds that had the deceased died at some later date the widow would then have had no action for damages.[435] The reasoning here is difficult to grasp. If valid it implies that no claim may ever be brought for loss of inheritance prospects. One must conclude that the *Burns* ruling is wrong.

[13.13.6] Loss of life cover: In *De Vos v SA Eagle Versekeringsmpy*[436] the death had prevented the payment of the premium which would have brought life cover into effect under a new life policy. The loss of the benefits under the policy were claimed as damages. Compensation was denied on the grounds that had there been no death the deceased would have been alive and without a right to claim under the policy. This was hardly a good reason for denying compensation because had the deceased still been alive he would have been at risk for dying at some other time at which stage the policy benefit would have been payable. One may observe, however, that the present value of premiums payable under the policy was at least equal to, and cancelled out by, the present value of the chance of benefits payable in the event of death at some later date. The *De Vos* ruling would seem to be correct, but for the wrong reasons.

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[429] *Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A) 612-13; Boberg 'Persons & family' 261n56 (footnote continued on page 262).

[430] This was the approach in *Pym v Great Northern Railway Co* (1863) 4 B&S 396 (Ex Ch); 122 ER 508 (Ex Ch).

[431] 1988 3 SA 355 (C) 364C.

[432] The Assessment of Damages Act 9 of 1969 precludes a court from taking account of 'benefits payable as a result of the death'. The words 'the death' seem to confine the application of the Act to benefits payable as a result of the death giving rise to the action for damages. Notional death at some other time does not seem to fall within the ambit of the Act. If the Act was intended to extend to later notional death the word 'the' should have been omitted.

[433] 9 of 1969.

[434] *Du Toit v General Accident Insurance* 1988 3 SA 75 (D) 75inf.

[435] *Burns v NEG Insurance* 1988 3 SA 355 (C) 364F-G 'The widow's pension could only have benefited her if he had *not* died in *this* collision but some four or five years later: as a result of some other collision? from cancer? - in which event defendant would have incurred no liability and she would have had only that pension and no damages claim against it'.

[436] 1985 3 SA 447 (A).

In the *Burns* matter, it deserves note, the earnings of the deceased had already been reduced for the contribution that he would personally have made to the pension fund, quite apart from the fact that the calculation had ignored all additional contributions that would have been made by the employer towards pension benefits. There was, in the *Burns* case, no question of the offset of gains and losses that validates the *De Vos* ruling.

[13.14] ACCELERATED BENEFITS - GENERAL PRINCIPLES

[13.14.1] Inheritances: On death the assets of the deceased pass to the heirs. The death may also give rise to the payment to the estate of life insurance and pension benefits. The Assessment of Damages Act[437] requires that when assessing damages for loss of support no regard shall be had, inter alia, to life insurance and pension benefits payable as a result of the death. The balance of the estate constitutes a deductible benefit.[438] The appropriate deduction to be made for the gain from an inheritance is a complex issue. For analysis purposes one needs to identify three separate components:

The usufruct: The value of the use of the assets by the family had there been no death.

The inheritance: The value of the assets which have accrued as a result of the death.[439]

The *spes*: The present value of the prospect, that is the *spes*, of inheriting at a later date had the death not occurred prematurely.[440]

[13.14.2] Use of assets: I have already dealt with this topic. Suffice it to say by way of recapitulation that if the breadwinner provided, for instance, the family home it follows that he provided support not only directly by way of a share of his earnings but also by way of a share of the use of the family home. The annual amount provided by way of support should thus be increased to allow for the use of facilities such as the family home.[441] Investments held by the deceased in, for instance the stock exchange, would not have been directly available for use by the family but the associated investment returns would have augmented the income available for the support of the family. It will usually be appropriate to add to the deceased's notional income available for support a real rate of return on the invested assets. The use value of business assets will usually be included in the deceased's reported earnings.[442]

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[437] 9 of 1969. Discussed at 345.

[438] In England the exclusion now extends to inheritances as well (s3(1) Administration of Justice Act 1982).

[439] *Groenewald v Snyders* 1966 3 SA 237 (A) 248E-F item (a).

[440] *Groenewald v Snyders* 1966 3 SA 237 (A) 248E-F item (b). Reinecke 1976 *TSAR* 26 31 55 points out that the value of the chance of inheritance, the *spes*, forms part of the claimant's patrimony.

[441] See section 13.5.

[442] See analysis in table 19 at 263.

[13.14.3] Changing values: The value of the inheritance will be taken from the liquidation and distribution account after exclusion of life insurance benefits.[443] By the time of the trial the values of the inherited assets will have changed and it becomes necessary to revalue these assets in the light of supervening events.[444] In the absence of explicit evidence it is usually reasonable to assume that growth asset values, like earnings, increase in line with inflation.[445] For depreciating assets, such as a motor car, one might allow for a decline in value.[446]

There is some uncertainty as to whether the deduction for inheritance is subject to currency nominalism,[447] that is to say should not be adjusted for subsequent increases in value, or whether regard should be had to changes in asset values during the pre-trial period. The *Hartley* decision distinguished adjustments for inflation in order to estimate earnings levels during the years following the injury or death, and the additional adjustment for loss of buying power.[448] In *Santam Insurance v Meredith*[449] the value of the business inherited by the widow had decreased substantially during the pre-trial period. The court had regard to this supervening event. The technique of adding inflation to estimate current asset values is not a prohibited adjustment for loss of buying power, but rather an estimate of the current value of the inherited assets. This estimate must of necessity give way to explicit evidence as to the actual value of the relevant assets.[450] It will be seen from table 21 below, column C, that the usual calculation of an accelerated benefit includes the assumption that the assets inherited will increase in future on average in line with inflation. In certain circumstances one might assume increases at a rate below the rate of inflation.

[13.14.4] Discussion of table 21: This table shows the detail of the calculation of the present value of the *spes* of inheritance had the deceased not been wrongfully killed when he was. The calculation contemplates a husband and wife both of the same age; it has been assumed that it is the husband who has died and that his widow now claims damages for loss of support. Column A shows the chance in each year that the wife, now a widow, would have been alive to inherit.[451] Column B shows the chance that her husband, had he not died

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[443]The calculation of the notional estate and distribution is not without difficulties. Not the least of the complicating factors is the Assessment of Damages Act 9 of 1969 (see section 13.17).

[444]*Legal Insurance v Botes* 1963 1 SA 608 (A) 617; *Santam Insurance v Meredith* 1990 4 SA 265 (Tk). In the latter case the value of the deceased' businesses inherited by the widow had declined substantially after the deceased's death. See too Davel 'Skadevergoeding' 122-3; Boberg 1988 *BML* 11 18 55 56n16.

[445]See paragraph 13.5.2.

[446]See paragraph 13.5.7.

[447]*SA Eagle Insurance v Hartley* 1990 4 SA 833 (A).

[448]*SA Eagle Insurance v Hartley* 1990 4 SA 833 (A) 840-1. See too paragraph 10.4.4.

[449]1990 4 SA 265 (Tk).

[450]This task is greatly complicated by the Assessment of Damages Act 9 of 1969 (see section 13.17).

[451]Based on life table 2 per *Quantum Yearbook* 1993.

TABLE 21 - YEAR-BY-YEAR CALCULATION OF *SPES* OF INHERITANCE

	Life-table chances		Year-by-year method			
Age	Chances of life *A*	Chances of death *B*	Estimated inheritance 13,2%py C	Interest Discount 16%py D	Present Value R AxBxCxD	Age
75	1.000	0.0755	100000	1.0000	8033	75
76	1.000	0.0753	113200	1.0000	9069	76
77	1.000	0.0741	128142	1.0000	10103	77
78	0.972	0.0718	145057	0.9285	9999	78
79	0.915	0.0684	164205	0.8004	8750	79
80	0.857	0.0649	185880	0.6900	7586	80
81	0.797	0.0615	210416	0.5948	6529	81
82	0.737	0.0587	238191	0.5128	5620	82
83	0.674	0.0574	269632	0.4421	4909	83
84	0.610	0.0551	305223	0.3811	4159	84
85	0.544	0.0525	345512	0.3285	3451	85
86	0.478	0.0492	391120	0.2832	2773	86
87	0.413	0.0450	442748	0.2441	2137	87
88	0.350	0.0400	501191	0.2105	1571	88
89	0.290	0.0344	567348	0.1814	1093	89
90	0.236	0.0285	642238	0.1564	717	90
91	0.187	0.0231	727013	0.1348	450	91
92	0.144	0.0182	822979	0.1162	267	92
93	0.108	0.0141	931612	0.1002	152	93
94	0.079	0.0105	1054585	0.0864	80	94
95	0.055	0.0077	1193790	0.0745	40	95
96	0.037	0.0055	1351370	0.0642	19	96
97	0.023	0.0038	1529751	0.0553	8	97
98	0.012	0.0025	1731678	0.0477	3	98
99	0.005	0.0016	1960259	0.0411	1	99
Σ				Total	87521	Σ

when he did, would have died in some later year.[452] Column C shows the estimated value of the future inheritance based on the assumption that the value of the inheritable assets would have increased in line with inflation.[453] Column D shows the discount for investment returns, and the column headed AxBxCxD shows the present value of the loss for

[452]The chances of death shown in this column decrease with advancing age when one would have thought that they should increase. The reason for this anomaly is that the chances of death are calculated taking a stand at age 75. The death rate at age 75 is so high that there are very few persons left to die off at the older ages.

[453]13,2% per year compound has been used by way of example for expected future inflation. Some actuaries add the full rate of the expected investment return: see Milburn-Pyle & Van der Linde 1974 *TASSA* 292 315. This latter procedure is not generally appropriate (see discussion under paragraph 13.14.7).

each separate future year. These separate losses total R87521, this being the value of the chance of inheritance, that is to say the value of the *spes*.[454] This value may need to be adjusted for general contingencies.[455] Important points to be noted in respect of this calculation are:

[13.14.5] Past loss of inheritance prospects: If the claim is settled some time, say, 3 years after the death then there will be a past loss of inheritance prospects.[456] The total of R87521 in table 12 comprises R27205 by way of past loss of the chance of inheritance, plus R60316 by way of future loss of inheritance prospects.

[13.14.6] Date for discounting: It is settled law that discounting should be done to the date of trial or settlement.[457] It follows that the present value of the *spes* of inheritance should also be calculated by discounting to date of trial or settlement. This needs to stated here because many actuaries continue to discount to date of death for this part of the calculation.[458]

[13.14.7] Projection of future value of inheritance: In table 21 this has been done in line with inflation (column C). This assumption presumes that real assets will increase in value in line with inflation. Some actuaries do the projection using the discount rate of interest instead of inflation.[459] Their reasoning is that all investment returns are ploughed back into increasing the value of the estate. In certain limited circumstances this may be a correct assumption. More usually, however, the family will be using assets such as the family home or a holiday cottage. The assumption that all returns are ploughed back thus ignores the fact that all family members shared in the benefit. For this reason it is preferable to reduce the rate of escalation of assets to the rate of inflation, and sometimes less, and then to add to the family income for apportionment between the dependants the use value of the assets. In certain instances it may even be appropriate to assume that the assets would all have been cash invested at interest, and that the entire interest receipts were being consumed with the support of the family. In this instance the prospective inheritance would be estimated without allowance for any increase in the nominal value of the assets. The discussion thus far has ignored savings from the deceased's income. These will usually be brought into account by

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[454]For further worked examples see Koch 'Damages' 207 289-90 303.

[455]*Groenewald v Snyders* 1966 3 SA 237 (A) 248E 'The better way is to value the benefit as the excess of (a) the sum received, over (b) the value of the prospect, which the dependant had, of receiving it eventually. The latter value will take into account any contingencies, such as the possibility that the bread-winner might have altered his testament...'; see too *Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 726A. A deduction will generally not be made for remarriage prospects due to the accumulated uncertainty of whether the notional husband on re-marriage will have assets and, if he does, the further uncertainty of whether or not he will bequeath any of them to his wife.

[456]See section 13.13.

[457]*General Accident Insurance v Summers* 1987 3 SA 577 (A).

[458]Observation based on numerous actuarial reports analyzed by my office up to 1993. The formulation of the deduction for accelerated benefits by Milburn-Pyle & Van der Linde 1974 *TASSA* 292 315 as (1-A). This oversimplification suggests that they too contemplated discounting to date of delict.

[459]See footnote 453.

apportioning between the dependants the deceased's total earnings without adjustment for that part of the earnings which would have been saved.[460]

[13.14.8] Complex contingencies: The year-by-year technique illustrated in table 21 permits the analysis of extremely complex inheritance situations involving 3 lives and more, an important consideration when allowance needs to be made for inheritances which the deceased, had he lived, may have received from his parents. For a civil servant the year-by-year technique provides a properly discounted value for the retirement gratuity which would have swelled his estate had he lived to normal retirement age.[461] There is a simpler, but less accurate, method of calculation based on the expectation of life.[462]

[13.14.9] Inheritance of family business: If the widow has taken over the family business the income she generates will be ignored when assessing her compensation. Only the value of the inherited business will be brought into account.[463]

[13.14.10] The 'Maasberg' approach: The view has been expressed that the deduction for inheritance should be assessed without regard for assets which were available for the use of the family prior to the death.[464] Typical of such assets would be the family home and furniture. This view relies on the judgment in *Maasberg v Hunt Leuchars & Hepburn*[465] where in the absence of dependent children the combined add-on value of usufruct and inheritance prospects were assessed as being equal to the deduction of what was inherited with a resulting nil adjustment to the award. The court did not profess to lay down a general rule in this regard. The *Maasberg* approach does not stand up to close analysis[466] and in *Snyders v Groenewald*[467] the court expressed the opinion that some deduction should be made for the advantage of the accelerated receipt of full *dominium* of the family home.[468]

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[460] *Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A) 481. See footnote 418.

[461] The rough and ready approach using life expectancies would overstate the relevant value (see paragraph 5.5.3).

[462] Howroyd 1958 *SALJ* 65 77. See too paragraph 5.5.1.

[463] *Nochomowitz v Santam Insurance* 1972 1 SA 718 (T) 727-8.

[464] Milburn-Pyle & Van der Linde 1974 *TASSA* 292 316; Newdigate & Honey 'MVA Handbook' 180(c). This approach reflects English law (McGregor 'Damages' 14ed 913). It is most appropriate in jurisdictions where the dependants claim as a group (see section 11.4). Under South African law each dependant has a separate claim (*Constantia Insurance v Hearne* 1986 3 SA 60 (A)). What is more, South African law does not acknowledge the existence of indivisible household expenses (see Davel 'Broodwinner' 111; footnote 187 above).

[465] 1944 WLD 2 13-14.

[466] See discussion in paragraphs below.

[467] 1966 3 SA 785 (C) 791D 'It seems to me that the *dominium* acquired by plaintiff under the will is a benefit over and above that enjoyed by her before her husband's death, and that some deduction must be made for this'. See too Milburn-Pyle & Van der Linde 1974 *TASSA* 292 316-19.

[468] Consider a childless married couple both aged 40 and a family home valued at R100000. The *Quantum Yearbook* 1993 at 74 shows the value of the *spes* of inheriting R100000 to be 0,3410xR100000=R34100. The yearly value of the use of one half of the house may be estimated as half of 2,5% py on R100000, ie R1250 per year; this has a present value of R25580 if one discounts at 2,5% per year over the 27,52 years which is the joint life expectancy of the couple. The net gain for the widow immediately after the death is R40320 (100000 - R34100 - R25580). This is significantly different from the nil deduction adopted in *Maasberg*'s case. The use value of R1250 per year may seem very low but one must bear in mind that this is the rental value net of all maintenance and running

For a healthy husband and wife of equal age the value of the spes is generally less than one half of the value of the relevant asset.[469]

Central to the treatment of the family home is the question of indivisible household expenses. In *Legal Insurance v Botes*[470] the widow was awarded only 50% of the rental cost of the flat occupied by herself and her husband jointly. The court dismissed the argument that the cost of providing her with alternative accommodation would probably have been a good deal more than the figure awarded. It seems that no express evidence had been led as to the cost of alternative accommodation. The allocation of one half seems to reflect an extension of the two-parts-one part formalism. If so then evidence as to the actual cost of alternative accommodation may well be admissible. There is authority for allowing the widow's relocation costs as part of the damages for loss of support.[471] The use of the two-parts-one-part formalism reflects a focus on the utility of what would have been provided had there been no death, rather than the need of the dependant having regard to the death.

[13.14.11] Family home out of community: If the marriage was out of community of property the wife would have shared the use of the family home with her husband, that is a one-half share of the usufruct.[472] Suppose that on the death of her husband she inherits the entire family home. The value of a usufruct, any usufruct, is always less than the value of unencumbered ownership, particularly when the usufruct is over a limited period such as a lifetime. This means that the value of what has been lost by way of one half of the use of the family home is less, often considerably less, than one half of the value of the family home.[473] The widow has, on the other hand, gained by way of the full ownership of a home which she only occupied prior to the death. Even if one then brings into account the value of the *spes* she had of inheriting this home at some other time she still has a net financial gain.

For an aged or sickly breadwinner and a youthful wife it is conceivable that the value of the *spes* of inheritance in the event of the death of the breadwinner substantially exceeds one half of the value of the asset. However, the same factors that swell the value of the *spes* will markedly reduce the value of use during the breadwinner's lifetime.

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expenses which would have been met out of the deceased's earnings (see section 13.5).

[469]See table of values for inheritance prospects published in *Quantum Yearbook* 1993 at 72-83. For a couple both aged 40 and subject to table 2 mortality the value of the *spes* of inheriting a home worth R100000 is R34100. From this should be deducted contingencies of about 15% giving a net value for the *spes* of R30000 in round figures.

[470]1963 1 SA 608 (A) 616D-F. More generally see 293 and 299.

[471]*Laney v Wallem* 1931 CPD 360 364 'Then also the reduction in expenditure, which the death of the head of the household warrants, cannot at once be put into force when he is taken away suddenly. The house cannot be let immediately, servants cannot at once be dismissed'.

[472]*Legal Insurance v Botes* 1963 1 SA 608 (A) 616B-F makes it clear that the widow's compensation must be based on one half of the value of the use of the family home. In this matter it had been argued that after the death she still required the entire home. See too *Nochomowitz v Santam Insurance* 1972 3 SA 640 (A) 647-9; Davel 'Skadevergoeding' 111.

[473]See footnote 468.

[13.14.12] Family home in community: If the marriage was in community of property the wife would have owned one half of the family home in her own right. The benefit of one half of the use of the house which she enjoyed would have been derived, not from her inheritance but from her own half share. She was thus fully self-supporting as regards her own occupation of the family home. Her future inheritance of her husband's half share would thus be a deductible gain[474] adjusted only for the *spes* of notional later inheritance.[475] It could be argued that her half-share derives entirely from the past earnings of the deceased and thus that the fact of her half ownership should be ignored. This reasoning, however, overlooks the fact that the asset had accrued to her by the time of the death, it was hers whatever its source.[476] The calculation of future loss of support, because it includes allowance for savings, would include the value of such future accruals.

[13.14.13] Deprived children: When assets used by the family are ignored as in the *Maasberg* case, then nothing is added to the claims of the children for what they have lost by way of use of such assets. *Groenewald v Snyders*[477] requires that when assessing the claims of the children no regard should be had to the support which they may now claim from their mother. This would include a right to occupy the family home which now belongs entirely to their mother. If there had been divorce and remarriage prior to the death, some of the children of the deceased may, after his death, be sent back to their mother, the wife of the first marriage. There is then no question of them continuing to share the family home.

[13.14.14] Right of recourse: The Apportionment of Damages Act[478] gives the defendant a right of recourse against the estate of the deceased if the deceased was contributorily negligent in bringing about his own death. This issue has already been discussed.[479]

[13.15] ACCELERATED BENEFITS - SELECTED PROBLEMS

[13.15.1] Funeral expenses: The person who pays the funeral expenses may recover them from the wrongdoer.[480] The loss suffered is the accelerated value of the funeral expenses,

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[474]*Botes v SAR* 1937 2 PH J18 (C). In this matter the court erred by failing to make an adjustment for the *spes* of later inheritance. Because the wife had provided her own half share of the accommodation there should be no adjustment for loss of use. See too *Legal Insurance v Botes* 1963 1 SA 608 (A) 621E-G.

[475]The figures in footnote 468 contemplate a marriage out of community of property. If the marriage had been in community of property the widow would have inherited one half of the family home worth R50000, the other half would have been hers by right, by reason of the community of property. The present value of her *spes* of inheriting this half share at a later date is one half of the value calculated under footnote 468, that is to say R17050 (half of R34100). Her half share of the use of the house was the half share she owned; her husband thus contributed nothing to her support by way of the use of half of a house. She has thus inherited R50000 and lost a *spes* worth R17050, a net gain of R32950 at the time of the death, assuming that a nil deduction for general contingencies is appropriate.

[476]See paragraph 13.5.4.

[477]1966 3 SA 237 (A) 247A-D.

[478]34 of 1956 ss2(1B) 2(6)(a); Boberg 1971 *SALJ* 423 441-58.

[479]See section 13.16.

[480]*Rondalia Assurance v Britz* 1976 3 SA 243 (T); *Commercial Union Assurance v Mirkin* 1989 2 SA 584 (C). This will include the cost of a tombstone *Commercial Union Assurance v Mirkin* 1989 2 SA 584 (C). The costs of a wake would also seem to be recoverable.

that is the cost actually incurred less the prospect of incurring the expense in years to come.[481] The practice in this regard is to award the full cost incurred without any abatement for the chance that the expense would have been incurred in any event at some later date. In practice the overstatement of the loss is largely offset by the non-award of interest on the damages and a rough justice is thereby achieved.

[13.15.2] Testamentary support: The claims by children will not be abated if, after the deduction for accelerated benefits, the widow has a financial gain.[482] This principle ensures that the widow is able to treat her inheritance as though the children were all self-supporting, as would have been the case had the death occurred in later life. However, if the will explicitly directs the widow to use her inheritance for the support of the children it is difficult to avoid the conclusion that this is a testamentary disposition in favour of the children which must be brought into account against their claims.

[13.15.3] Gratuitous transfer of inheritance: A mother may gratuitously transfer her right to inheritance to the children. This could be achieved by donation, sale on favourable terms, or a refusal to adiate. It seems that the damages for both her and the children should be assessed as though the disposition had not been made. Her gratuitous act is *res inter alios acta*.

[13.15.4] Loss of benefits of divorce: When husband and wife divorce the court is empowered to order a redistribution of assets.[483] In the event of death prior to divorce there is no provision for such redistribution but the widow does have a right to claim maintenance from the deceased's estate.[484] A widow is not obliged to mitigate her damages by claiming such maintenance.[485] It is appropriate to make a deduction for the contingency of divorce.[486] An untimely death of the husband prior to the divorce would deprive the widow of the prospect of a substantial transfer of assets on divorce, a consideration which may well offset any deduction which might otherwise have been made for the contingency of divorce. This consideration would be particularly relevant if divorce proceedings were in progress at the time of the death. A divorced woman has no claim for damages for loss of support.[487] The position of a woman who is about to divorce is unclear, but one may speculate that the court will take a generous view.

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[481] Reinecke 1976 *TSAR* 26 34-5.

[482] *Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D.

[483] s7 Divorce Act 70 of 1979.

[484] Maintenance of Surviving Spouses Act 27 of 1990.

[485] *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 306A; *Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D.

[486] *De Jongh v Gunther* 1975 4 SA 78 (W).

[487] See paragraphs 13.2.19 and 13.2.20.

[13.15.5] Support claimed from estate: The children have a right to claim support from the estate of their deceased breadwinner.[488] A wrongdoer cannot demand that the children mitigate their loss by exercising this right.[489] In *Heyns* case it was held, however, that if the children have exercised their right against the estate before finalizing their claim for damages then the value of support from the estate is deductible.[490] The claim against the estate is for future support and is granted on the understanding that the child will be in need in future years. An award for damages would render the child self-supporting without any payment from the estate being necessary. The executor of an estate who admits a claim for support by children who have a right to damages would seem to be acting contrary to the interests of the heirs and may well incur personal liability for such an oversight. The provision of support from an estate is claimed not as an inheritance but as a debt owing by the estate.[491] The *Heyns* ruling offends against the principle that alternative sources of support after the death should be ignored.[492] The proper approach seems to be that the payments of support by the estate should be ignored. If any payments have been made the estate should be entitled to recover these from the child by way of the *condictio indebiti*, after damages have been awarded.[493]

[13.15.6] Usufruct: It is common with large estates that the widow is left a lifetime usufruct of the entire estate while the children inherit the *nudum dominium*. Alternatively, this may be structured as a trust with the children as reversionary beneficiaries. The yearly value of a usufruct over real assets, ie immovable property or shares, will usually increase over the years, probably more or less in line with inflation.[494] The value of the *nudum dominium* will usually increase similarly. The value accorded to the use of immovable property is the open-market rental value reduced for running costs and maintenance.

A usufruct over money usually implies the right to take the full nominal rate of interest. The value of the *nudum dominium* will then not increase but remain constant in nominal terms.

The usufruct over assets in general will usually include the right to switch assets between, for example, growth assets and cash deposits, although there may be restrictions on the disposal of immovable property, such as a farm. Due to the complications created by insurance pay-outs the mix of assets at the date of death is often a decisive factor when valuing the usufruct.

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[488]See paragraphs 6.4.4 and 13.2.17.

[489]*Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 306A; *Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D. Contra Reinecke 1976 *TSAR* 26 50-56. See too 285 above.

[490]*Heyns v SA Eagle Versekeringsmpy* 1988 (T) (unreported 6.7.88 case 13468/86). To the extent that such support derives from life insurance money it must be ignored.

[491]See paragraph

[492]*Groenewald v Snyders* 1966 3 SA 237 (A) 247A-D.

[493]See Visser 1988 *THRHR* 492-507; *Van Zyl v Serfontein* 1992 2 SA 450 (C); *Muller v The Master* 1992 4 SA 277 (T) for the requirements for bringing the *condictio indebiti*.

[494]See section 13.5.

[13.15.7] Fideicommissum: The value of a *fideicommissum* would probably be assessed on the same basis as a usufruct. A *fideicommissum residui* would have a larger value to the holder than a *fideicommissum* which requires onward transmission of undiminished assets.

[13.15.8] Massing: This gives a rise to a usufruct for the surviving spouse over the combined assets of husband and wife. The children become owners of the *nudum dominium* of the entire joint estate. The death thus deprives the widow of the ownership of her own assets. The accelerated value of this loss should be offset against the gain by way of the accelerated value of an unshared usufruct over the deceased's assets.

[13.15.9] Inheritances by children: A child who inherits the *nudum dominium* of an asset cannot in any way utilise this to meet the costs of his support.[495] It seems correct that a child's claim should not be reduced by reason of such an inheritance. This same consideration suggests that a deduction should also not be made from the child's compensation for the value of the *spes* of receiving full ownership in the distant future when self-supporting. A child who inherits full ownership, usually in trust, is not required to utilise capital to meet the costs of support unless ordered to do so by a court.[496] It follows that the deduction for such an inheritance should be limited to the income derived from the inheritance during the period of dependency. If the inheritance is a cash sum the income is the nominal interest return on the capital. For real assets such as lettable property the income may be the rental income net of expenses. If the rule against consumption of capital views capital as the nominal value inherited at death then the child may be compelled, notionally at least, to convert growth assets into fixed interest assets. The value of the *spes* of receiving this income had death not occurred when it did is generally so small that it can be ignored.[497]

[13.16] APPORTIONMENT OF DAMAGES

[13.16.1] Contributory negligence of deceased: The Apportionment of Damages Act[498] provides that if the deceased was contributorily negligent in bringing about his own death then the wrongdoer and the estate of the victim are to be joint wrongdoers.[499] The wrongdoer is obliged to pay in full but has a right of recourse against the estate assets to the extent that such assets have not been brought into account in assessing the damages. When the estate has no assets, as happens with the vast majority of deceased victims in South

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[495]Amongst Indian families the *nudum dominium* is commonly left to the oldest son with a usufruct to his mother. Under black customary law the entire estate goes to the eldest son of the deceased (Seymour 'Customary law' 5ed 274-9).

[496]*Constantia Versekeringsmpy v Victor* 1986 1 SA 601 (A) 612-13. In *Ex parte Jacobs* 1950 2 PH M26 (O) in a claim for maintenance from a deceased estate the court ordered that a deduction be made for the full amount of the child's capital.

[497]See footnote 428.

[498]34 of 1956 ss2(1B) 2(6)(a); Boberg 1971 *SALJ* 423 441-58.

[499]ss2(1B) 2(6)(a) of the Apportionment of Damages Act 34 of 1956; Boberg 1971 *SALJ* 423 441-58; Davel 'Skadevergoeding' 82-4.

Africa, the wrongdoer is without recourse.[500] The so-called '1% rule' then applies[501] whereby the wrongdoer incurs liability for 100% of the damages notwithstanding contributory negligence of only 1%. The dividing line between this and absolute no-fault liability is extremely fine. A defendant may no longer avoid liability by reason of the so-called 'last chance' rule.[502]

[13.16.2] Assets protected against recourse: The wrongdoer who seeks a contribution from the estate of the deceased may only proceed against assets which were not brought into account in assessing the damages.[503] The widow who has inherited will have her damages reduced by the accelerated value of her inheritance. The accelerated value is calculated as the amount actually inherited less the value of the chance of inheritance at some later date.[504] It has been suggested that a defendant may recover from the excess of the inheritance over the amount actually deducted.[505] The better view is that protection extends to the full amount inherited.[506] To the extent that persons other than dependants have inherited[507] the assets are available to satisfy a right of recourse. If the assets have been distributed the wrongdoer who has paid may recover by way of the *condictio indebiti*.[508]

[13.16.3] Recourse against life insurance payments: The Assessment of Damages Act[509] precludes a court from making a deduction for the accelerated value of life insurance payments made to the estate. It follows that such life insurance monies are not taken into account by the court when assessing damages. The proceeds of the policies are thus available to satisfy the defendant's right of recourse. The first R10000 of policies which have been in force for longer than three years is protected under the Insurance Act.[510] If

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[500]With small estates it is usual that the widow takes over the assets and signs an undertaking to pay all debts of the estate (s18(3) of the Administration of Estates Act 66 of 1965). It is conceivable that a wrongdoer may exercise a right of recourse against such a widow. It is doubtful, though, that the Master would require the widow to meet such a claim. An executor could then be appointed and the estate wound up as insolvent.

[501]*Union Government v Lee* 1927 AD 202.

[502]Davel 'Skadevergoeding' 85-6.

[503]s2(6)(a) of the Apportionment of Damages Act 34 of 1956.

[504]*Groenewald v Snyders* 1966 3 SA 237 (A) 248E-F 'The better way is to value the benefit as the excess of (a) the sum received, over (b) the value of the prospect which the dependant had of receiving it eventually'. See section 13.14.

[505]Davel 'Skadevergoeding' 84; Newdigate & Honey 'MVA Handbook' 189(c).

[506]The expression 'accelerated benefits' lumps together as one net amount a deduction for the full amount inherited with an add back for the *spes* of inheritance at some later date had the death not occurred when it did (see section 13.14). If one has regard to the separate components of the deduction then it is clear that the entire inheritance is brought into account when assessing the damages (Corbett & Buchanan 3ed 95).

[507]A house or farm or business may be left to an older self-supporting son.

[508]See Visser 1988 *THRHR* 492-507; *Van Zyl v Serfontein* 1992 2 SA 450 (C); *Muller v The Master* 1992 4 SA 277 (T) for a discussions of the requirements for bringing the *condictio indebiti*.

[509]9 of 1969. For a fuller discussion of this Act see 345.

[510]ss39 40 of the Insurance Act 27 of 1943. Newdigate & Honey 'The MVA Handbook' 189 take this to mean 'R10000 of life cover'. An alternative interpretation is 'R10000 of surrender value immediately prior to the death'. The death claim values for such policies may amount to several hundred thousand rand. s45 states that the

it is the widow who has inherited then the right of recourse may be effected by an offset against her claim for damages. She will then have to bear the burden of apportionment not only for her own claim but also for the claims of the children.

[13.16.4] Assets used by the family are protected: In order to allow for the value of the use but for the death it is common to make no deduction for the accelerated value of the family home, furniture and car.[511] The reasoning underlying this approach is that the gain of these effects offsets a loss suffered of equal value.[512] It follows that the family home, furniture and car, have, in an in-out sense,[513] been taken into account in assessing the damages and are thus not available as assets to satisfy the wrongdoer's right of recourse.[514]

[13.16.5] Two schools of thought: The prevailing state of the law governing the effect of the contributory negligence of a deceased breadwinner reflects a compromise[515] between two different viewpoints:

* The first school points out that the dependants' right of action arises by reason of the death and lies directly between the dependants and the killer. The wrongful conduct of the breadwinner in bringing about his own death is a matter between the wrongdoer and the deceased. Because the dependants did not act negligently in bringing about their loss they are accordingly entitled to damages without reduction for the contributory negligence of their breadwinner.

* The second school takes the view that value of the right to support which has been lost is only as good as the breadwinner himself. This school does not deny that the right of action of the dependants is separate and distinct from that of their breadwinner. It does maintain, however, that the economic value of what may be claimed in terms of that right is intimately affected by the conduct of the breadwinner.

It deserves note that the contract of employment of the deceased lies between himself and his employer. The dependants are not party to this contract and yet they may rely thereon for purposes of proving the quantum of their damages. If the evidence reveals that the deceased was an irresponsible or reckless person this will lead to a substantial deduction for general contingencies. In other words the past and anticipated future negligence of the breadwinner in the conduct of his financial affairs will affect the damages claimable by the dependants. If a breadwinner had been dismissed from his job shortly before his death this would be

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judgement creditor or executor may choose which policies are available for satisfaction of the claim.

[511]Newdigate & Honey 'MVA Handbook' 180(c) (the relevant case is *Maasberg v Hunt Leuchars & Hepburn Ltd* 1944 WLD 2 and not the one cited). It is doubtful that this rough and ready approach is generally valid: see Koch 'Damages' 194-5 207-11; Davel 'Skadevergoeding' 123.

[512]*Maasberg v Hunt Leuchars & Hepburn* 1944 WLD 2 13-14. See 333 below.

[513]See 183 for the in-out adjustment for pension benefits received by an injured victim.

[514]Newdigate & Honey 'MVA Handbook' 189(A) express the contrary opinion but seem to have failed to appreciate the reasoning behind ignoring the assets.

[515]Boberg 1971 *SALJ* 423 446-59.

taken into account when assessing the damages. If he chooses to commit suicide the dependants have no right of action. If he chooses to drive recklessly and is then killed it seems perfectly reasonable that the dependants should carry that part of their loss attributable to the conduct of their breadwinner.[516]

A major criticism of the logic of the first school is that it is unduly legalistic.[517] It ignores the economic realities.[518] The major argument in its favour is that, whatever the failings of the breadwinner, society should ensure adequate support for needy dependants. However, if this is to be the guiding factor then all needy dependants should be compensated regardless of considerations of fault.[519] It would be wrong when distributing public funds to create a privileged class.[520]

[13.17] INSURANCE AND PENSION BENEFITS

[13.17.1] Unfair legislation: An important function of insurance and pension benefits it to ensure adequate funds for the support of dependants after the death of the breadwinner.[521] The support lost by dependants will include the value of savings,[522] including savings through the medium of insurance policies and pension funds. Such considerations notwithstanding legislation has been passed which precludes a court from taking account of pension and insurance benefits payable as a result of the death.[523] The effect of this Act is that a dependant may claim compensation for the loss of savings whilst at the same time enjoying the benefit of those same savings.[524] There are numerous objections to this

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[516]This problem has been resolved in English, Canadian and Australian law by giving to the dependants no better right after the death than the breadwinner would have had in the event of his being injured and personally suing for loss of earnings. (Davel 'Broodwinner' 160-1; Cooper-Stephenson & Saunders 'Damages in Canada' 406-7; Luntz 'Damages' 2ed 109-15).

[517]Van der Walt 'Sommeskadeleer' 59 66 86 165 241 282 285 has criticized the analysis of damages assessment in terms of the legal science of rights and obligations; see too Bloembergen '*Schadevergoeding*' 22 26-7; 48 above.

[518]'Dit klink waarskynlik logies... Daar by die verhoor gekyk moet word na al die gebeure wat dit voorafgegaan het en om skadevergoeding in die lig van al die bekende feite en die werklikhede te bepaal' *General Accident v Summers* 1987 3 SA 577 (A) 612G 615B.

[519]The modern dependants' action in South Africa compensates on the basis of loss not need. For instance life insurance and pension payments to widows will be ignored in terms of the Assessment of Damages Act 9 of 1969.

[520]'We see no reason why victims of traffic accidents must be favoured above others' Grosskopf Commission report (1981) 14.

[521]*Groenewald v Snyders* 1966 3 SA 237 (A) 247 248sup 'Buying insurance cover is a recognised feature of family protection in modern times'; *Commercial Union Assurance v Stanley* 1973 1 SA 699 (A) 704H 'Her husband would probably have secured her future, if he were to predecease her, by insurance or suitable investments'.

[522]*Marine & Trade Insurance v Mariamah* 1978 3 SA 480 (A) 488-9.

[523]Assessment of Damages Act 9 of 1969.

[524]*Du Toit v General Accident Insurance* 1988 3 SA 75 (D): The deceased had been a pensioner. The provision of a pension from the same pension fund but under a different paragraph in the rules was held to be non-deductible in terms of the Act. I have under paragraph 13.7.10 discussed the inclusion of life insurance premiums in the income apportioned between dependants.

legislation, most notably that it creates a privileged class of claimants.[525] Certain points governing its application deserve mention:

[13.17.2] Benefits deemed non-existent: The Act states that insurance and pension benefits payable as a result of the death shall not be taken into account when assessing damages for loss of support. This means that compensation is to be assessed as though the benefits do not exist.[526] It follows that estate duty should be recalculated on the reduced value of the estate.[527] The executor's fees should similarly be recalculated. If the widow has inherited shares in a company the value of which has been enhanced by the payment of an insurance benefit on the life of the deceased then the shares must be revalued as though the insurance payment did not exist.[528]

[13.17.3] Not all benefits are payable as a result of the death:[529] The pension under a retirement annuity plan, for instance, may continue to be payable for a total of 10 years by reason of the original contract concluded by the deceased. The rules of some pension funds may provide for a continuation of part or all of the deceased's pension.[530] Such pension benefits do not fall within the definition of the Act[531] and are thus deductible when assessing damages for loss of support, subject to an adjustment for acceleration.

[13.17.4] Deductible life insurances: The deceased may have been owner of policies on the lives of his children or his business partners or his wife. The surrender values of such policies will be included as assets in the estate accounts. These are not benefits payable as a result of the death and should be included in the deductible value of the deceased's estate. Sometimes the death occurs shortly after the maturity date of an endowment policy. The benefit paid to the estate is then not payable as a result of the death but as a result of the maturity. One also encounters instances where a woman has been twice widowed. The pension and life insurance benefits provided as a result of the death of the first husband do

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[525]Koch 1989 *THRHR* 203 214-15. Contra Van der Walt 'Sommeskadeleer' 229; 1980 *THRHR* 1 19. Van der Walt views the Act as an example where public policy justifiably overrides logic. The Act undoubtedly echoes the irrational sentimentality with which many view the phenomenon of death. At a more mundane level it reflects successful opportunism by life insurance offices with a view to promoting sales (Boberg 1964 *SALJ* 346 353-4 records the early history of this legislation). The major criticism of the legislation is that it favours those who can afford life and pension benefits.

[526]*Heyns v SA Eagle Versekeringsmpy* 1988 (T) (unreported 6.7.88 case 13468/86).

[527]In England the courts have refused to adjust estate duty on the grounds that the duty was a debt owing by the estate which could not be apportioned to individual assets (*Baker v Hopkins* [1958] 3 All ER 147 (QBD); Boberg 1964 *SALJ* 346 357-8). In South Africa s13(2) of the Estate Duty Act 45 of 1955 prescribes a formula for apportioning the duty between assets. This formula has regard to the life insurance benefits paid. The better view is to exclude life insurances from the estate altogether and then to re-assess the estate's notional liability for duty, if any.

[528]*Malyon v Plummer* [1963] 2 All ER 344 (CA); *Pitt v Economic Insurance* 1957 3 SA 284 (D) 286F-inf; Boberg 1964 *SALJ* 346 359n52.

[529]*CIR v Nolan's Estate* 1962 1 SA 785 (A).

[530]*Du Toit v General Accident Insurance* 1988 3 SA 75 (D). In this matter the court found that in terms of the fund rules the widow's pension was not a continuation of the deceased's pension but a new and separate entity.

[531]Assessment of Damages Act 9 of 1969.

not fall within the ambit of the Act[532] and should thus be brought into account when assessing the damages for loss of support from the second husband.

[13.18] THE 'LOST YEARS'

[13.18.1] Dependants' right of action: When a breadwinner is seriously injured his loss is shared by his family in the sense of a reduced value for their right to support. The compensation awarded to the breadwinner for his personal injury notionally restores the value of the dependants' right to support.[533] However, if the breadwinner has suffered a reduction to his expectation of life he will receive no compensation for the 'lost years'.[534] The dependants have then *prima facie* suffered a loss of support in respect of the 'lost years'. There are three main methods for dealing with this problem in equity:

Method 1: Wait until death: The dependants could wait until the breadwinner eventually dies before they bring their claim.[535]

Method 2: Immediate increase to breadwinner's claim: The breadwinner could include in his claim the value of the support lost by the dependants during the 'lost years'.

Method 3: Immediate separate right of action for dependants: Allow the dependants to bring their own actions for loss of support concurrently with the action by their breadwinner for loss of earnings.[536]

The position in South African law is that the dependants must wait for their right of action for loss of support until their breadwinner eventually dies,[537] that is to say that method 1 applies.

[13.18.2] Difficulties with evidence: The requirement that the dependants must wait until death actually occurs presumes that proof of cause of death, when it occurs, will be a straightforward matter. This is to be doubted. Proof of cause of death 10 or 20 years after

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[532]Assessment of Damages Act 9 of 1969.

[533]*De Vaal v Messing* 1938 TPD 34 38; *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 303-4. Under the dependants' action itself there is some overlapping of rights of action (Dendy 1990 *SALJ* 155-167) but this only arises once death has occurred.

[534]*Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 306F-G. See 227 above for further discussion.

[535]This is the approach proposed by Reinecke 1976 *TSAR* 26 50-56 coupled with a claim by the breadwinner during his lifetime for what he would have earned during the 'lost years'.

[536]See footnotes 551 and 552.

[537]*Ex parte Oliphant* 1940 CPD 537 543-4; *Evins v Shield Insurance* 1980 2 SA 814 (A) 839E-F 'The cause of action for loss of support ...will arise only upon the death of the deceased, which may occur some considerable time after the accident'. This statement is clearly *obiter*, but, considering the history of the dependants' action, would probably be decisively persuasive. See too *Lockhat's Estate v North British & Mercantile Insurance* 1959 3 SA 295 (A) 303-4. English law on this subject needs to be received with considerable caution on this topic because under English law the award of compensation to the breadwinner precludes the dependants from thereafter bringing an action for loss of support (McGregor 'Damages' 14ed 861 862; Cooper-Stephenson & Saunders 'Damages in Canada' 240; Luntz 'Damages' 2ed 399-400).

the date of the original injury is likely to be a highly contentious matter. The absence of reported judgments on this subject[538] suggests that it is so contentious that litigation is considered unduly risky and dependants go uncompensated for a loss genuinely suffered, albeit in a contingent sense.

Consider the following list of causes of death for paraplegics: renal failure (15,3% of deaths); cardiovascular failure (19,6% of deaths); respiratory failure (13,9% of deaths); and suicide (10,8% of deaths).[539] In many instances it will be extremely difficult many years after the original injury to establish a causal link between the original injury and the eventual death.[540] Not the least problem will be an ever-increasing list of supervening events. Thus, for instance, the death of a paraplegic who fails to obtain medical assistance for pressure sores cannot be imputed to the person who caused the paraplegia.[541] And yet numerous deaths of this nature are included in the normal average mortality statistics for paraplegics.[542] Is it fair to burden a defendant with damages for a death where the proximate cause is the deceased's own negligence? One may note that the early death of a paraplegic due to his own negligence with handling his condition is a foreseeable event. What is more the condition of paraplegia increases the degree of health care needed in order to stay alive. If one bears in mind that legal causation is largely a question of judicial policy then there is much to be said for ignoring the deceased's own negligence, and even *dolus*, as regards his health care. However, even if the deceased had not been injured he would have been at risk for dying early at some other time due to the normal hazards of life. It would not be fair to burden a defendant with the cost of the chance of loss of support in the normal uninjured course of events. The defendant's liability is for the increased risk of such loss. The problem with waiting until death actually occurs many years later is that the health consequences of paraplegia will be a contributory factor in most instances. The court will then be faced with a complex web of supervening causes which will complicate, rather than facilitate, the problem of allocating responsibility for the loss suffered by the dependants. **One solution to this problem of allocating responsibility for the loss would be to apportion the loss of support on the basis of the increased statistical risk of death occasioned by the original injury.** Such an allocation is best done while the breadwinner is still alive, and concurrently with assessing his own damages for personal injury.

Quite apart from the problems with cause of death it is quite conceivable that 10 or 20 years after the event the defendant is untraceable. The injury would have interrupted the breadwinner's career 10 or 20 years earlier. The dependants' loss should be measured in terms of that notional career path. The employer may be untraceable or so changed in character that a career path cannot be identified. Interpreting extensive facts can be a

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[538] *Ex parte Oliphant* 1940 CPD 537 was concerned with death within 12 months after the injury.

[539] Geisler *et al* 1983 *Paraplegia* 364 369.

[540] Alternative consider the deleterious effects of liver failure caused by injury which will impede a breadwinner's judgment resulting in his dying by, for example, a fall down a staircase or carelessly stepping into a lane of fast traffic. The same may happen to a person with a brain injury.

[541] *S v Mokgethi* 1990 1 SA 32 (A).

[542] The statistic for suicides probably excludes those who wilfully induce their death by drinking, smoking, or otherwise failing to follow medical advice.

daunting and inconclusive task. The employer and the insurer will often, after 5 to 10 years, have destroyed all records relating to the deceased.

The above considerations suggest that the rights of the dependants, and the defendant, are not adequately protected by granting a right of action when a compensated breadwinner eventually dies. The case law is such that reform needs to be introduced by legislation.[543] But what form should it take?

[13.18.3] Reform: Whatever method is adopted, the dependants should receive immediate rather than deferred compensation for the prospect of loss of support during the 'lost years'. The advantage of processing the dependants' claims at the same time as that of the breadwinner is that all the relevant evidence will be on hand. This will ensure, inter alia, that the dependants are informed that they have an action in law. Compensation for dependants at the time of the breadwinner's claim would be achieved both by method 2 and method 3 above. Method 3 is to be preferred in that it removes from the discretion of the breadwinner the disposition of funds relating to events notionally after his death.[544] Bearing in mind that dependants, both widow and children, have a right to support from their breadwinner's estate[545] this consideration is not a weighty one. Adoption of method 2 has the disadvantage that a breadwinner who settles his claim for damages thereby contractually deprives his dependants of their rights of action under the dependants' action. This would be contrary to one of the fundamentals of the dependants' action.[546] Burchell records that the Law Commission in England[547] has rejected as too complicated the granting to the dependants of a separate right of action during the 'lost years', that is to say a solution according to method 3.[548] South African lawyers on the other hand are familiar with the logistics of separate rights of action for each dependant.[549] The objection recorded by Burchell probably has much less force in South Africa than in England. The granting of separate rights of action to the dependants at the time of the injury ensures that a plea of *res iudicata* may be raised against the same dependants if the breadwinner subsequently dies under circumstances which can be directly imputed to the injury, that is to say circumstances which would give rise to claims for damages by the dependants for loss of support, if they had not already received compensation.

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[543]It is conceivable, but unlikely, that the courts would view the *dictum* in *Evins v Shield Insurance* 1980 2 SA 814 (A) 839E-F as *obiter* and initiate such reform judicially. The problem of reduced expectation of life was unknown to the Roman-Dutch jurists who dealt with all claims using the tables from the Digest (D35.2.68) (see 83). Such an extension of the dependants' action would be an appropriate response to changing circumstances.

[544]In England where method 1 prevails it has been said that 'The law can make no distinction between the plaintiff who looks after dependants and the plaintiff who does not... On his death those damages will pass to whosoever benefits under his will or on an intestacy' *Pickett v British Rail Engineering* [1979] 1 All ER 774 (HL) 784e.

[545]See 285.

[546]*Jameson's Minors v CSAR* 1908 TS 575 588 589; Davel 'Broodwinner' 488.

[547]No 56 of 1973.

[548]1976 *SALJ* 365-7.

[549]*Constantia Insurance v Hearne* 1986 3 SA 60 (A).

It perhaps deserves note that when a dependant is injured the breadwinner who incurs expenditure, by reason of his duty of support, has an immediate right of action for the loss suffered.[550] Potgieter Neethling & Visser are in favour of allowing an immediate right to action to the dependants[551] as too is Boberg.[552]

[13.18.4] Prescription: The only real difficulty with adopting method 3 is the question of prescription. Death is readily proved, but not so easily a reduction in life expectancy. It is quite likely that evidence as to reduced life expectancy only becomes available at the time the breadwinner's claim for damages for personal injury goes to trial. Even then it may be hotly disputed by the breadwinner. A satisfactory solution to the prescription problem would be to suspend its running against the dependants until the eventual death of the breadwinner. Defendants cannot complain about such an arrangement which would place them in no a worse position than they are at present.[553] By allowing the dependants a right of action concurrently with the breadwinner, defendants would be able to finalize at an early stage all aspects of liability arising from the injury.

[13.19] CONCLUSIONS

[13.19.1] Registration of marriages: The action for damages for loss of support has its origins with popular Germanic dissatisfaction with the Roman-law ethic that the body of a freeman has no value. It is perhaps no accident that the modern form of the dependants' action crystallized after the Council of Trent[554] and the introduction of formal procedures for proving the existence of a marriage. Modern South Africa faces a similar crisis with the need to accommodate the social values of blacks, values that echo those of the early Germanic law of Europe.

The first major step in the right direction would be to elevate the status of black customary marriages to the same level as civil marriages. This might be by way of legislation enabling the registration of a civil polygamous marriage.

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[550] *Schnellen v Rondalia Assurance* 1969 1 SA 31 (W); see discussion at 193 above and Neethling Potgieter & Visser 'Deliktereg' 2ed 288.

[551] Neethling Potgieter & Visser 'Deliktereg' 2ed 289 'Gevolglik behoort die afhanklike in beginsel 'n aksie te hê vir sover hy verlies van onderhoud kan bewys'.

[552] Boberg 1960 *SALJ* 438 447 writes 'It is submitted that in this situation the dependants may recover damages for loss of support which they would probably have received during the period by which the breadwinner's life has been shortened. When a man has been killed his dependants have an action for loss of support: surely killing may be regarded for this purpose as no more than a shortening of a man's expectation of life to the limit. Can it be logically relevant that he survives an hour, a day, a year or a decade, as long as his life has been shortened? The fact that the injured man is not yet dead when the dependants sue can make no difference in view of the recognition of a dependants' action for bodily harm short of death'. This was written before the handing down of the ruling in *Evins v Shield Insurance* (see footnote 25). See Howroyd 1960 *SALJ* 448 450 for a similar opinion to that of Boberg.

[553] At present they have the prospect of an action by the dependants at some undetermined future date. They may argue that in practice they are at present never called upon to meet such a claim, but that with solution 3 they would be called upon to meet many claims by dependants. Such an objection to reforming legislation would only serve to highlight the need for such reform.

[554] See paragraph 13.1.4.

A second step would be to allow claims for dependants whose right to support derives from contract. The limiting factor to the size of such claims would be the general contingencies attaching to the continued provision of support. The value of the chance of durability may be very small indeed. The fact of a registered marriage would enhance the prospects of permanence.

[13.19.2] Formalisms: The dependants' action, more so than the action for personal injury, has become highly formalised. The assessment of damages for loss of support is based increasingly on formulas such as the two-parts-one-part apportionment of family income.[555] A number of compensating advantages, notably life insurance and pension benefits[556] and the revived earnings prospects of a widow after the death,[557] are left out of account. These are not necessarily undesirable developments provided it is accepted that the dependants' action is becoming less and less compensatory and increasingly like an extended life insurance policy with benefits defined by common-law rules of assessment. The difficulties, particularly in the South African context, of adducing adequate evidence render an abstract approach to assessment something of a necessity.

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[555]See 304.

[556]See 345.

[557]See 320.

OVERALL CONCLUSIONS

The major theme of this thesis has been the contingent nature of damages and the interplay of diverse compensating- and loss-aggravating factors in the assessment of damages for personal injury and death. The concept of the balance sheet of a life plan brings these factors together in a single schematic. The present value of uncertain prospective gains and outlays is assessed using the technique of valuation of a chance. This technique is of universal application to all valuation problems, although for practical purposes the calculation process is often simplified by using short-cut techniques. The analyst should take care to distinguish short-cut procedures from fundamental structures.

Consideration of utility in abstract, and its concretisation by way of formalisms of calculation and evidence, leads to the conclusion that the present value of a life plan is a price, in a manner of speaking, a form of value in exchange. The lump sum does not provide the means to replace, or reproduce, the earnings or support that it represents. It is does not effect restitution in the sense of recreating the income or support that would otherwise have been earned, or received. As with the old Germanic *wergilt* it is but the price that the law allows as compensation for the wrong done to the claimant. Admittedly the price is calculated according to complex considerations of law, economics and medicine. These considerations have close regard for the life plan that has been destroyed. The calculation done by an actuary does not provide some mystical value which may used by consuming interest and capital to replace the lost income or support. The value calculated by an actuary is no more than the value of the chance of those earnings reduced by the actuary for the chance of early death, and then further reduced by the court for general contingencies. The award of once-and-for-all lump-sum damages effects restitution, but only in the limited sense of topping up the present utility of the claimant's life plan to what it would have been had there been no injury or death.

Administrative efficiency dictates that there is a limit to how much detailed evidence can be mustered to personalise the award to be made. Once the court is satisfied that a loss has been suffered it must make do with such concrete evidence as is available. It follows that a lump-sum award for damages has a generalised abstract component which varies from case to case. Instalment compensation can, in suitable circumstances, enable greater particularisation but in many instances the evidential difficulties will ensure that the regular payments are themselves but idealisations.

Causation is an essential component of damage. A cause has no meaning without an expected alternative sequence of events free of the event giving rise to the claim for damages. Hypothesis is thus essential even when compensation is being paid by instalments. The longer the period of time since the original event causing damage the more supervening events there will be to blur the causal connection. This problem is most evident with claims for *damnum emergens*. With claims for *lucrum cessans* the continuing loss remains hypothetically based on what was foreseeable at the time of the injury or death. Due to the

abstraction there will then be few supervening events that will upset the original assessment but, conversely, the regular payments continue to depend on the original assessment formulated many years previously.

Ideal compensation will be based on a consideration of the universal effect of the wrongful act on the claimant's life plan, both advantageous and disadvantageous. This concept requires the deduction of many collateral benefits that, in terms of the substantive law, are non-deductible. In a utopian state where all citizens are protected by a centralised insurance scheme there would be full deduction of collateral benefits, a wholly macro-economic approach. South Africa is still a long way from becoming a utopia.

The action for damages for personal injury comes closer than any other to the utopian ideal. There is by and large an interactive regard for most aspects of the damaged life plan. Compensating advantages provided by an employer are generally brought into account. Loss of pure utility is compensated by way of the award of general damages for pain and suffering and loss of the amenities of life. The further development of the action would be assisted by judicial recognition of objectivized utility as a form of patrimonial loss, coupled with suitable procedures for quantifying the damages for such losses. Compensation for loss of use of assets, particularly money, still leaves much to be desired.

The modern dependants' action, by way of contrast with the action for personal injury, has become increasingly stylised, that is to say formalistic and divorced from the true financial circumstances of the family after the death of a breadwinner. The action has become directed at recovering 'loss of support' rather than financial loss having regard to the overall effect on the dependants' life plans. It seems fair to say that the substantive law reflects a number of instances of excessive focus on a 'right to support' at the expense of a broader, more realistic, view of financial loss. The ghosts of Grueber and Mommsen haunt us still. The indications are that the Roman-Dutch action at the time of Grotius was allowed to a far wider range of claimants than is permitted in modern South Africa. The stylised nature of the modern dependants' action emphasises the 'pricing', rather than the restitutory, nature of the awards made for damages for loss of support.

ABSTRACT

This thesis is concerned with damages for continuing loss, such as most commonly arise with personal injury, or the death of a breadwinner. The approach has been multidisciplinary rather than multinational. The thesis comprises 4 sections: General theory; Technical issues; Technique and law governing personal injury claims; Technique and law governing claims for loss of support. The thesis does not seek to be a compilation of all relevant legal sources.

The initial inquiry focuses upon utility theory and the related concept of value. In its most general form utility is merely descriptive of a vital life force. Its application to the assessment of damages requires objectivization. Money and risk are both subject to utilitarian considerations. Techniques can be developed for the measurement of personal utilities. The statistical concept of an expectation describes the utility of uncertain, usually future events. In suitable circumstances market value provides an objective guide to utility. Abstraction promotes forensic efficiency. Concretization, attention to personal details, ensures for each claimant and defendant a proper hearing. Justice involves a blend of these conflicting goals.

Perfect restitution is only possible in extremely rare instances. In general the damages awarded by a court are compensation, a fair equivalent for what has been lost. When differencing utility regard must be had for the effect of the award for damages on the overall utility after the wrongful act. The assessment of lump-sum damages is assisted by the concept of a patrimonium which includes as assets the present values of future uncertain incomes and outlays. The assessment of damages requires a comparison between the hypothetical state had there been no wrongful act and the actual state having regard to that act.

Fundamental to the assessment of damages for uncertain loss is the technique, known as 'valuation of a chance', whereby the present value of an uncertain hypothetical event is calculated by taking the value of that event as a certainty and then reducing it by a percentage to allow for the contingency of non-occurrence. The technique is applicable equally to past and future losses. The technique is distinguished from proof in a civil court on the balance of probabilities. The determination of the percentage chance may have regard to historical statistics but will more often be based on subjective value judgments. The analysis of chances according to subjective considerations has been a major field of study for analysts of utility.

The average expectation of life is a point estimate obtained by summing the survival chances for all possible years of life to age 99 and beyond. The chance of inheritance is similarly calculated but with the chance of death in each year substituted for one of the survival ratios. The standard actuarial calculation for ascertaining present value proceeds by taking the value of the chance in each year of the relevant income or expenditure and then summing the

resulting series of separate values. It is generally unsound to suggest that by consuming interest and capital a claimant may reproduce the income that has been lost.

Despite the inadequacies of a compensation model based upon consuming interest and capital it is a useful concept provided its limitations are borne in mind. Conditions of high inflation dictate that there is a 'ballooning' of the original capital for many years before inroads into accumulated funds begin to be made. To test the consumable income from investing an award a court should ignore high nominal rates of return and look to rates closer to the real rate of return. The prudent investor will save for a retirement that extends well beyond the expiry of the expectation of life. The impact of tax on interest receipts is aggravated by high rates of inflation and renders such investments unattractive compared to growth investments such as mutual funds and immovable property.

Life annuities provide a medium for contractually transferring the risk of early and late death to a life insurer. The use of actuaries by the courts has its origin in the need for evidence as to the price at which to purchase a life annuity. This evidence has with time become corrupted into a fiction about consuming interest and capital over the expectation of life. In recent years there has been a resurgence of interest in life annuities in the form of 'settlement annuities'. There are a variety of different annuity contracts of which the 'annuity certain' and the 'life annuity' deserve special note. It was the practice in the classical Roman-Dutch law to ignore the price at which 'life annuities' were commercially available. That practice, with few exceptions, continues today.

The 'discount rate of interest' is better described as the 'discount rate of return'. A nominal rate (I) comprises a real rate of return (R) and an offset to inflation (F). For compensation calculations R is the most important measure. Historical analysis suggests that R has a value of about 2,5% per year compound. The net capitalization rate will be different from R if the cash flow to be valued does not escalate in line with inflation. The allowance for the risk aspect of general contingencies is best achieved by an increase to the discount rate of return.

The deduction for general contingencies reflects the court's subjective impression as to the adequacy, or otherwise, the comparative utility, of the primary actuarial calculations. Although collateral benefits are sometimes viewed as part of the general contingencies the risks attaching to what has been, or will be lost, are the major component of the deduction. Allowance for such risks can equally be achieved through an increase to the discount rate of return.

Interest is the measure of loss for deprivation from the use of money. The loss of use of goods can generally be quantified by interest on the value of the goods subject to an adjustment for the rate at which the goods increase or decrease in value with the passage of time. A court is competent to award damages expressed in terms of a foreign currency. The rate of mora interest must then be adjusted to that appropriate to the relevant foreign economy.

Before dealing with the explicit actions for loss of earning capacity and support one needs to examine the impact of collateral benefit rules upon the distribution of the costs of damage within the community at large. A comprehensive approach to damages requires the

deduction of insurance and employment benefits. A court making an award of damages should specify that a claimant should reimburse certain welldoers including an employer. Benefits provided by the State are not gratuitous and are generally deducted.

The expression 'loss of earning capacity' embraces both earnings and living expenses. 'Loss of earnings' and 'loss of earning capacity' should not be distinguished. Just as increased living expenses, *damnum emergens*, increase the compensation payable so too saved living expenses reduce damage suffered and thus the defendant's liability. General damages has a patrimonial aspect and awards must have some regard to the cost of goods and services in the community at large. Likely earnings and likely expenses are the criteria by which to measure earning capacity and spending needs. The earning capacity of business capital should be distinguished from the earning capacity of the victim. Compensation for 'loss of earning capacity' includes loss of support for the victim's family. Illegal earnings are best dealt with by basing compensation on what would have been earned had the victim acted legally.

The loss of a **right** to support determines who may bring an action for loss of support. The financial loss suffered is, however, not the right to support but the value of the financial benefits expected from the breadwinner in consequence of this right. This financial value will be assessed according the value of the chance of receiving the support. The working wife who earns sufficient to support herself has no right, at that point in time, to claim support from her husband. The loss by the dependants will be assessed without regard for compensating advantages other than inheritance and remarriage. The focus is on the support which would have been provided had there been no death. The widow who takes up employment after the death will be compensated as though she were unemployed. Conversely a widow who ceases employment in consequence of the death has no claim under the dependants' action for this loss of earnings. Loss of inheritance prospects will be compensated to the extent that these would have provided ongoing support. Although dependants have in theory a claim for loss of support during the 'lost years' such claims will usually fail due to difficulties with evidence.

OPSOMMING

Hierdie proefskrif handel oor skade vir voortdurende verlies, soos dié wat intree weens persoonlike besering of die dood van 'n broodwinner. Die benadering is metodologies multidissiplinêr eerder as multinasionaal. Die proefskrif bevat vier hoof afdelings: Algemene Teorie; Tegniese Aangeleenthede, Tegniek en Reg ten opsigte van eise vir persoonlike besering; Tegniek en Reg ten opsigte van eise vir verlies aan onderhoud. Die proefskrif is nie bedoel as 'n volledige uiteensetting van alle relevante regsbronne nie.

Die aanvanklike ondersoek fokus op die utiliteitsteorie en die verwante begrip van waarde. In mees algemene vorm is utiliteit beskrywend van 'n kern lewensdrang. Toepassing van hierdie begrip op skadeberekening noodsaak die objektivering daarvan. Geld en risiko is albei onderworpe aan utiliteitsoorwegings. Tegnieke vir die meting of beraming van persoonlike utiliteit kan ontwikkel geword. Die statistiese begrip verwagting ('expectation'), beskryf die utiliteit van onsekere, gewoonlik toekomstige, gebeurtenisse. In gepaste omstandighede verteenwoordig markwaarde 'n objektiewe riglyn vir die bepaling van utiliteit. Objektivering bevorder geregtelike koste-effektiwiteit. Konkretisering of verpersoonliking, dws aandag aan persoonlike besonderhede, verseker dat beide eiser en verweerder volledige geleentheid tot bewyslewering by verhoor verkry. Geregtigheid verg die versoening van hierdie teenstrydige doelstellings.

Volkome restitusie is in weinige situasies moontlik. Oor die algemeen verteenwoordig die skadevergoeding wat deur 'n hof toegestaan word, 'n billike ekwivalent vir dit wat verloor is. Waar utiliteitsvergelykings gedoen word, moet die effek van die skadetoekenning op totale utiliteit nà die onregmatige daad, in ag geneem word. Die bepaling van enkelbedrag-skadevergoeding behels aanwending van die vermoënsbegrip, dws die huidige waarde van 'n onsekere, toekomstige stroom inkomstes en uitgawes, as 'n bate of las bereken. Die bepaling van skade verg 'n vergelyking tussen die hipotetiese toestand waar geen onregmatige daad plaasgevind het nie, en die werklike huidige toestand met volle inagneming van die gevolge van die daad.

Wesenlik by die bepaling van skadevergoeding vir 'n onseker verlies is die tegniek van waardebepaling van 'n kans ('valuation of a chance'). Die tegniek behels die bepaling van die huidige waarde van 'n onseker, hipotetiese verlies deur eers die waarde daarvan as 'n sekerheid te bepaal, en daarna laasgenoemde met 'n persentasie te verminder om voorsiening te maak vir die gebeurlikheid dat dit nie sou plaasgevind het nie. Die tegniek is ewe toepaslik vir reeds gelede en toekomstige verliese. Die tegniek is onderskeibaar van die bewysstandaard van oorwig van waarskynlikhede wat in siviele sake toegepas word. By bepaling van 'n persentasie kans word historiese statistiese gegewens in ag geneem, maar dit sal meer dikwels op subjektiewe waardebepalings berus. Die ontleding van kanse wat volgens subjektiewe oorwegings beraam word, is 'n belangrike gebied van ondersoek vir navorsers op die gebied van utiliteitsleer.

Die gemiddelde lewensverwagting is 'n puntskatting, verkry deur die bymekaartel van die oorlewingskanse vir alle moontlike lewensjare tot op ouderdom 99 of meer. Die kans om te erf word op soortgelyke wyse bereken, behalwe dat die kans van sterfte in die betrokke ouderdomsjaar gebruik word in plaas van die oorlewingskans. Die standaard aktuariële metode vir die berekening van die huidige waarde van 'n reeks toekomstige bedrae behels bepaling van die waarde van die kans van die inkomste of uitgawe in elke betrokke jaar, en dan die bymekaartel van die herleide reeks afsonderlike waardes.

In die algemeen is dit misleidend om voor te gee dat die eiser deur stelselmatige vertering van inkomste en kapitaal die enkelbedrag vergoeding kan omskep in 'n reeks bedrae wat gelyk is aan die reeks verliese. Nieteenstaande die tekortkominge van 'n vergoedingsmodel wat op laasgenoemde fiksie berus, kan hierdie wyse van berekening nuttig wees, mits die beperkinge daarvan in ag geneem word. Omstandighede van hoë inflasie het die gevolg dat vir 'n groot aantal jare daar 'n sterk groei ('ballooning') van die oorspronklike kapitaal plaasvind, voordat die geakkumuleerde fondse begin daal. As 'n hof 'n aanduiding van die verteerbare gedeelte van die beleggings-opbrengste wil verkry, moet hoë, inflasie-aangejaagde nominale rentekoerse in die proses geïgnoreer word. 'n Opbrengskoers nader aan die reële rentekoers is meer van pas. 'n Versigtige belegger sal fondse spaar vir 'n aftreetydperk wat verder strek as die verstryking van sy lewensverwagting. Die effek van belasting op renteverdienstes word vererger deur toestande van hoë inflasie sodat rentebeleggings minder aantreklik word teenoor reële beleggings soos effektetrusts of vaste eiendom.

Lyfrentes of annuiteite is beleggingsmetodes waardeur die risiko verbonde aan vroeë of laat sterfte aan 'n lewensversekeraar oorgedra kan word. Die howe se gebruik van aktuariële getuienis het sy oorsprong in die behoefte aan getuienis oor die prys waarteen 'n lyfrente aangekoop kan word. Hierdie soort getuienis is mettertyd verkeerdelik aanvaar as grondslag vir die fiksie van vertering van kapitaal en inkomste oor lewensverwagting. Oor die afgelope paar jaar was daar hernude belangstelling in lyfrentes in die vorm van skikkingsannuiteite ('settlement annuities'). Daar is 'n verskeidenheid annuiteitskontrakte, waarvan jaargeld en lyfrente die vernaamste is. In die klassieke Romeins-Hollandse reg was dit die praktyk om die prys waarteen 'n lyfrente kommersieël aangekoop kon word, te ignoreer. Hierdie praktyk, met min uitsonderings, duur vandag nog voort.

Die begrip 'verdiskonterings-rentekoers' kan meer korrek beskryf word as die 'verdiskonterings-opbrengskoers'. 'n Nominale koers (I) bevat 'n reële opbrengsgedeelte tesame met 'n vergoeding vir inflasie (F). Met vergoedingsberekeninge is R die belangrikste gedeelte. Historiese analise toon dat, bereken oor lang periodes, R 'n waarde van om en by 2,5% pj saamgestel, het. Die netto kapitalisasiekoers sal verskil van R indien die kontantvloei nie saam met inflasie ge-eskaleer word nie. Die aanpassing vir die risiko-element van algemene gebeurlikhede kan optimaal gedoen word deur die verdiskonterings-koers te verhoog.

Die aftrekking vir algemene gebeurlikhede weerspieël die hof se indruk van die toereikendheid, of anders gestel, die betreklike utiliteit van die primêre aktuariële berekenings. Alhoewel kollaterale voordele soms as deel van die algemene gebeurlikhede behandel word, verteenwoordig die grootste gedeelte van die aftrekking die ander risikos verbonde aan wat alreeds verloor is, of wat in die toekoms nog verloor sal word.

Voorsiening vir sulke risikos kan net so wel in ag geneem word deur 'n verhoging in die verdiskonteringskoers.

Rente is die maatstaf vir die verlies wat veroorsaak word wanneer iemand van die gebruik van geld ontneem word. Die verlies van die gebruik van goedere kan in die algemeen gekwantifiseer word deur berekening van rente op die waarde van die goedere, onderhewig aan 'n aanpassing vir die koers waarteen sulke goedere se waarde oor die betrokke tydperk toe- of afgeneem het. 'n Hof is bevoeg om skade wat in 'n buitelandse geldeenheid uitgedruk is toe te staan. Die *mora* rentekoers moet in sulke gevalle aangepas word sodat dit geskik is vir toepassing in die betrokke buitelandse ekonomie.

Voor bespreking van die aksies vir die verlies van verdienvermoë en onderhoud moet die uitwerking van die voordeeltoerekeningsreëls op die verspreiding van die koste van skadevergoeding in die gemeenskap ondersoek word. 'n Omvattende benadering tot skadevergoeding vereis die aftrekking van versekering- en diensvoordele. 'n Hof wat skadevergoeding toeken, behoort te beveel dat eisers sekere weldoeners, insluitend werkgewers, moet terugbetaal. Voordele toegeken deur die Staat is gewoonlik nie *ex gratia* nie en behoort dus gewoonlik afgetrek te word.

Die uitdrukking 'verlies aan verdienvermoë' het betrekking op verdienste en ook lewenskoste. 'Verlies aan verdienstes' en 'verlies aan verdienvermoë' moet nie onderskei word nie. Net soos verhoogde lewenskoste (*damnum emergens*) die vergoeding betaalbaar verhoog, so ook verminder uitgeblewe lewenskoste die skade en dus ook die verweerder se aanspreeklikheid. Algemene- of nie-vermoënskade het tog betrekking op die vermoë en toekennings moet rekening hou met die koste van goedere en dienste. Waarskynlike verdienste en waarskynlike uitgawes is die kriteria waaraan verdienvermoë en uitgawebehoeftes gemeet behoort te word. Onderskeid moet getref word tussen die verdienvermoë van besigheidskapitaal en die verdienvermoë van die slagoffer. Vergoeding vir 'verlies aan verdienvermoë' sluit in vergoeding vir die verlies aan onderhoud van die slagoffer se afhanklikes. Ten opsigte van onregmatige verdienste behoort die vergoeding gebasseer te word op wat die slagoffer sou verdien het, het hy regmatig opgetree.

Die verlies aan 'n **reg** op onderhoud bepaal wie 'n aksie mag bring vir vergoeding weens verlies aan onderhoud. Die finansiële verlies verteenwoordig nie soseer die reg op onderhoud nie, maar die waarde van die finansiële voordele wat van die broodwinner verwag kon word, dit wil sê, wat hy sou betaal het ter vervulling van hierdie reg. Hierdie finansiële waarde word bepaal volgens die waarde van die kans dat die onderhoud ontvang sou word. Die werkende eggenote, wat genoeg verdien om haarself te onderhou, het geen reg op daardie tydstip, om onderhoud van haar man te eis nie. Die verlies van die afhanklikes word bepaal sonder inagneming van vergoedende voordele, behalwe erflatings en hertroue. Die fokus word geplaas op die onderhoud wat ontvang sou word indien geen dood plaasgevind het nie. Die weduwee wat as gevolg van die dood begin werk word vergoed asof sy nie werkend is nie. Daarenteen het 'n weduwee wat ophou werk as gevolg van die dood, geen eis deur middel van die afhanklikes se aksie ten opsigte van haar eie verlies aan verdienste nie. Verlies aan erfvooruitsigte word vergoed in die mate dat dit voortgesette onderhoud sou voorsien het. Alhoewel afhanklikes teoreties 'n eis het vir verlies aan onderhoud gedurende

die 'verlore jare' (waar 'n beseerde slagoffer se lewensverwagting ingekort is), misluk sulke eise gewoonlik weens gebrek aan voldoende getuienis.

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